

**A RIGHT WAY AND A WRONG WAY:  
REMEDYING EXCESSIVE POST-TRIAL  
DELAY IN LIGHT OF *TARDIFF*,  
*MORENO*, AND *TOOHEY***

A Thesis Presented to The Judge Advocate General's School  
United States Army in partial satisfaction of the requirements  
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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APRIL 2007

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DELAY IN LIGHT OF *TARDIFF*, *MORENO*, AND *TOOHEY***

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## Table of Contents

<b>I.</b>	<b>Introduction.....</b>	<b>3</b>
<b>II.</b>	<b>Historical Background.....</b>	<b>6</b>
	A. History of Criminal Appeals.....	6
	B. Post-Trial Delay Cases.....	11
<b>III.</b>	<b><i>United States v. Tardiff</i>.....</b>	<b>21</b>
<b>IV.</b>	<b><i>United States v. Moreno</i> and <i>United States v. Toohey</i>.....</b>	<b>44</b>
<b>V.</b>	<b>Proposed Changes.....</b>	<b>71</b>
	A. Amendments to the Rules for Courts-Martial.....	71
	B. Regulatory Changes.....	76
	<b>Conclusion.....</b>	<b>83</b>

## I. Introduction.

Since the inception of the Uniform Code of Military Justice (UCMJ), military courts have struggled with the problem of excessive post-trial delay. Delays at every stage of the post-trial process, from transcribing the record and obtaining final action from the convening authority to getting a convicted soldier's appeals decided by both tiers of the military appellate system, have plagued the military justice system. In response, the United States Court of Appeals for the Armed Forces (CAAF), and its predecessor in name, the United States Court of Military Appeals (CMA), have tried various approaches to address this problem over the years—some more aggressive and proactive and some more conservative.

At the heart of this problem is the question of jurisdiction for the military courts. Specifically, Article 59(a) of the UCMJ prohibits CAAF or the lower service Courts of Criminal Appeal from granting relief to a servicemember on the grounds of a legal error unless there has been “material prejudice to a substantial right.”<sup>1</sup> Historically, this prohibition has limited the ability of the courts to deter excessive post-trial delays because appellants can not usually demonstrate that they were materially prejudiced by the delay. In 2001, however, CAAF decided the case of *United States v. Tardif*, in which it held that the service Courts of Criminal Appeal could grant sentence relief for post-trial delay, even in the absence of prejudice, by virtue of their power to determine an appropriate sentence under Article 66(c), UCMJ.<sup>2</sup> In 2006, CAAF decided the case of *United States v. Moreno*, which

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<sup>1</sup> UCMJ art. 59(a), 10 U.S.C. § 859(a)(2005).

<sup>2</sup> *United States v. Tardif*, 57 M.J. 219 (2002).

mandated a new methodology for review of post-trial delay cases.<sup>3</sup> Using a balancing test it adopted from the Sixth Amendment speedy trial case of *Barker v. Wingo*, CAAF held that a finding of prejudice is not an absolute requirement, but merely one of four factors to be considered in determining whether to grant relief for a violation of due process.<sup>4</sup> Additionally, the Court set forth benchmarks for various steps of the post-trial process, violations of which would trigger a presumption of unreasonableness. Shortly after the opinion in *Moreno*, CAAF decided *United States v. Toohey*, in which it found sentence relief warranted for unreasonable post-trial delay despite specifically finding that there was no prejudice stemming from the delay.<sup>5</sup>

Unfortunately, CAAF's decisions in *Tardif*, *Moreno*, and *Toohey* run afoul of the jurisdictional limitation imposed on the military courts by Article 59(a). Unreasonable post-trial delay is unquestionably a legal error. As such, it cannot be remedied absent material prejudice to a substantial right. While either Congress or the President could reform the post-trial processing system, CAAF's limited jurisdiction precludes it from the type of judicial rulemaking in which it engaged in *Moreno*. Instead, this author proposes that the President reduce problems with the current system of post-trial processing through amendments to the Rules for Courts-Martial and Department of Defense (DOD) regulations. Specifically, the President should amend the Rules for Courts-Martial to include a method for a convicted servicemember to address pre-action delay issues with the convening authority, as well as a provision that mandates a specific time limit for transmitting the record of trial from the

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<sup>3</sup> *United States v. Moreno*, 63 M.J. 129 (2006).

<sup>4</sup> *Id.* at 136 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)).

<sup>5</sup> *United States v. Toohey*, 63 M.J. 353 (2006).

convening authority to the service Court of Criminal Appeal after action and that sets forth remedies for violations of that time limit. Additionally, the President should direct that current DOD regulations be amended to allow a convicted servicemember awaiting appeal to receive an interim DD Form 214 and that servicemembers in confinement be eligible for clemency and parole consideration even before final action has been taken on their cases by the convening authority.<sup>6</sup> These minor changes would help address some of the more easily correctible causes of post-trial delay, as well as take away the most frequent sources of harm to servicemembers awaiting appeal of their cases.

Part II of this thesis will review the history of the military appellate process and the development of military case law dealing with the issue of post-trial delay and how the courts have chosen to address the problem given the statutory limitations on their jurisdiction. Part III will discuss why CAAF's attempt to give the service Courts of Criminal Appeal authority to remedy excessive post-trial delay not resulting in prejudice was unlawful in light of the plain text of Articles 59(a) and 66(c), the legislative history thereof, and commonly-accepted rules of statutory interpretation. Part IV will discuss why CAAF's mandated methodology in *Moreno* is flawed and why CAAF's holdings in *Moreno* and *Toohey*, allowing itself to grant relief for post-trial delay without a specific showing of actual prejudice, violate the jurisdictional limitation of Article 59(a). Finally, Part V will lay out two proposed amendments to the Rules for Courts-Martial which will help expedite post-trial processing and two proposed regulatory changes which will limit harm caused to servicemembers awaiting appeal.

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<sup>6</sup> The Department of Defense (DD) Form 214, Certificate of Release or Discharge from Active Duty, is given to servicemember upon discharge from active service and indicates, *inter alia*, the characterization of the servicemember's discharge and the total time served on active duty.



## II. Historical Background.

### A. History of Military Criminal Appeals.

It may seem counterintuitive, but nowhere does the United States Constitution guarantee the right to a criminal appeal. Appellate rights are purely a function of Congress and the various state legislatures granting these rights through specific legislation. In the first years of our nation's existence, the legislatures universally granted appellate rights to civilian convicts to ensure the propriety of the underlying convictions.<sup>7</sup> The military was different, however. Military justice was always seen as being a tool of the commander to maintain discipline in his ranks, and the extreme need for such discipline when fighting wars, combined with the isolation and mobility of armies in the field, made it necessary for justice to be dispensed with more quickly and efficiently. As John Adams wrote in 1777, "There can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can there be happiness or safety in an army for a single hour when discipline is not observed."<sup>8</sup> Thus, even before the declaration of our nation's independence, the Continental Congress passed Articles of War which authorized George Washington to convene courts-martial for soldiers with minimum process, and with sentences that could be carried out immediately upon Washington's approval of the court-martial's findings.<sup>9</sup>

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<sup>7</sup> See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

<sup>8</sup> JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES 1775-1980*, at 3 (2001).

<sup>9</sup> The Continental Congress approved Articles of War in 1775, which were based on the British Articles of War, and which similarly, placed virtually all authority for military justice with the commander in the field. An

When our Constitution was created, the idea of having a separate military justice system was preserved. Article I, Section 8 of the Constitution provides that “[t]he Congress shall have the power ... [t]o make rules for the government and regulation of the land and naval forces;” and for the next one hundred and fifty years, very little was changed from the original Articles of War passed by Congress in 1775 and 1776.<sup>10</sup> With the exception of cases involving general officers, the dismissal of any commissioned officer, or sentences of death in time of peace, commanders still had non-reviewable authority to approve and execute courts-martial sentences.<sup>11</sup> In 1917, a number of black soldiers rioted in Houston, Texas, after being taunted by white civilians, resulting in significant property damages and a number of deaths.<sup>12</sup> Fully complying with the existing Articles of War, the commanding general immediately convened courts-martial for all of the black soldiers—thirteen of whom were given the death penalty and hanged the day after the courts-martial.<sup>13</sup> Given the swiftness of the executions in this controversial case, the War Department issued a directive that, in the future, no executions could be carried out until the case was reviewed by the Office of The Judge Advocate General to ensure that the court-martial was conducted legally, and shortly thereafter, Congress created Boards of Review, composed of lower-ranking judge advocates,

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amended version was adopted in 1776. *Id.* at 1-3; *see also* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975, at 10-11 (William S. Hein & Co., Inc. 1993).

<sup>10</sup> U.S. CONST. art. 1, § 8, cl. 14.

<sup>11</sup> WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, at 459-65 (1920 ed.)(discussing Articles of War 105, 106, and 108).

<sup>12</sup> LURIE, *supra* note 8, at 40; *see also* *United States v. Bauerbach*, 55 M.J. 501, 503 (Army Ct. Crim. App. 2001) (citing HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, *supra* note 9).

<sup>13</sup> *Id.*



who were to review cases and give nonbinding recommendations regarding the legal sufficiency thereof.<sup>14</sup>

By World War II, military justice was still viewed as being harsh and inconsistent, with the unfettered discretion of commanders to influence and approve courts-martial leading to sometimes outrageous results. Perhaps the most notorious case in this regard was that of Private Eddie Slovik. While tens of thousands of soldiers deserted during World War II, many of whom received only light punishment and a discharge, Private Slovik was the only one who was executed for his offense.<sup>15</sup> The circumstances of Private Slovik's offense were no worse than those in a typical desertion case, but General Eisenhower chose to approve the execution as a deterrent for all of the thousands of other soldiers who were deserting.<sup>16</sup> Cases such as this contributed to a basic mistrust of the military justice system by the millions of soldiers who were drafted during the war. After the war, there was a strong movement for change.

Congress immediately took up the call to lessen the perceived injustice and arbitrary nature of military justice and amended the Articles of War in 1948, to create above the Boards of Review, Judicial Councils composed of three general officer judge advocates which would have the authority to review cases for legal sufficiency and to make

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<sup>14</sup> *Id.* at 40-41; *see also Bauerbach*, 55 M.J. at 503 (citing Article of War 50 ½, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 797-99).

<sup>15</sup> WILLIAM B. HUIE, *THE EXECUTION OF PRIVATE SLOVIK*, at 8 (1970 ed.).

<sup>16</sup> *Id.* at 9.

recommendations as to the fairness of the sentence.<sup>17</sup> Like the lower Boards of Review, the recommendations of the Legal Council were nonbinding and could be overridden by the Secretary of the Army. Under the amended articles, The Judge Advocate General, the Secretary of the Army, and the President all had the power to mitigate or remit portions of sentences.<sup>18</sup> Despite this rapid change, there was still a strong sentiment that more needed to be done to improve and standardize military justice across all branches of the military, so, in 1949, Secretary of Defense James Forrestal created a joint service working group to propose a new uniform code of military justice to be submitted to Congress.<sup>19</sup> Rather than merely amend the old Articles of War, the new code essentially started over and developed a more comprehensive system of military justice which added significant procedural protections for servicemembers at all stages of the criminal process. Among these new protections was, for the first time in the military justice system, a mechanism for independent judicial review of courts-martial, to include the creation of a new civilian Court of Military Appeals. Despite the sweeping nature of the changes proposed by Forrestal's working group, the new Uniform Code of Military Justice was passed by both houses of Congress with relatively few alterations and was signed into law in 1950.<sup>20</sup>

Under the new Uniform Code, a servicemember convicted by a court-martial had a three-step review process. The first step in the process was the traditional review of the court-martial by the convening authority, who could, as always, approve or disapprove any or

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<sup>17</sup> See LOUIS F. ALYEA, *MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR*, 32-43 (1949)(text and commentary regarding amended Articles of War 48 through 51).

<sup>18</sup> *Id.* at 42-43.

<sup>19</sup> LURIE, *supra* note 8, at 90.

<sup>20</sup> Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (May 5, 1950).

all portions of the findings and sentence adjudged by the court-martial.<sup>21</sup> The UCMJ added, *inter alia*, a requirement that the convening authority's staff judge advocate provide a nonbinding recommendation as to the court-martial's legal sufficiency and as to an appropriate disposition of the charges and sentence before the convening authority could take action on the case.<sup>22</sup> The second step of the new process was appellate review by revamped Boards of Review (later renamed Courts of Criminal Appeal). Unlike the old Boards of Review, which could only offer recommendations as to legal sufficiency, the new Boards were given binding authority to reverse cases for legal errors, as well as to review the record to ensure that there was enough evidence to support the findings of guilt (i.e., factual sufficiency).<sup>23</sup> Additionally, given the existing concern over the harshness and inconsistency of sentences in the military, the Boards of Review were granted the power to review cases to ensure that the sentences were fair in light of the facts and circumstances of the case.<sup>24</sup> This authority of an appellate court to consider the fairness of a sentence was, and is, unique in American criminal law. The final step of the review process was the creation of the U.S. Court of Military Appeals (now-the U.S. Court of Appeals for the Armed Forces), which was composed of civilian judges appointed by the President, and which was given the authority to

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<sup>21</sup> UCMJ art. 60.

<sup>22</sup> UCMJ art. 60(d).

<sup>23</sup> UCMJ art. 66.

<sup>24</sup> *Id.*

review cases heard by the Boards of Review.<sup>25</sup> Unlike the Boards of Review, however, the Court of Military Appeals was only authorized to review cases for legal sufficiency.<sup>26</sup>

## B. Post-Trial Delay Cases

While the UCMJ created a new system of appellate review for servicemembers with considerable due process protections, the Code was basically silent as to how quickly the three-step review process was to take. This left it to the military courts themselves to develop their own jurisprudence on the matter. The first case in which the then-Court of Military Appeals addressed the issue of post-trial delay was that of *United States v. Tucker*.<sup>27</sup> In *Tucker*, the accused's original court-martial was wrought with errors, to include having the accuser serve as the court reporter, having a legally incomplete specification, and the admission of improperly prejudicial evidence.<sup>28</sup> Following the affirmation by the board of review, the results of the review were, inexplicably, not served upon Tucker for more than a year, which delayed his petition to the Court of Military Appeals.<sup>29</sup> The Court of Military Appeals found that Tucker was entitled to a rehearing due to the errors in his case, but because of the delays in the appellate process, the court instead dismissed the only charge facing Tucker, stating, "Unexplained delays of the kind presented here should not be

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<sup>25</sup> UCMJ art. 67.

<sup>26</sup> *Id.*

<sup>27</sup> *United States v. Tucker*, 26 C.M.R. 367 (C.M.A. 1958).

<sup>28</sup> *Id.* at 368.

<sup>29</sup> *Id.* at 369.

tolerated by the services, and they will not be countenanced by this Court.”<sup>30</sup> Unfortunately, the opinion in *Tucker* was quite short and there was no further discussion regarding the court’s methodology in considering the post-trial delay issue.

Two years after *Tucker*, the Court of Military Appeals again addressed the issue of post-trial delay in *United States v. Richmond*.<sup>31</sup> This time, however, the court discussed the issue in greater length. The court observed that, while the Sixth Amendment to the Constitution guarantees a speedy trial to both ensure rapid resolution of charges against those whom are presumed innocent and to ensure that an accused’s ability to prepare a defense is not hampered by the passage of time, neither the Sixth Amendment nor Article 10, UCMJ, applied to the appellate process.<sup>32</sup> The court continued:

It can be argued that some of the disadvantages we mention above may devolve upon accused persons if the appellate processes are unduly delayed, but that is a bare possibility under present-day military procedure and in a given situation, if the accused is prejudiced, relief can be granted him.<sup>33</sup>

The opinion then went on to discuss the fact that the relief which had been granted in *Tucker* was due to the “multitude of other errors which prejudiced the accused and made further proceedings undesirable.”<sup>34</sup> The holding in *Richmond* is significant for two reasons. First, the Court of Military Appeals acknowledged for the first time that there is no independent right to a speedy appellate process in the military, and additionally, to the extent there is a

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<sup>30</sup> *Id.* at 369.

<sup>31</sup> *United States v. Richmond*, 28 C.M.R. 366 (C.M.A. 1960).

<sup>32</sup> *Id.* at 369.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing *Tucker*, 26 M.J. at 367).



problem with post-processing delay, the relevant inquiry is not the length of the delay, but rather, the specific prejudice to the accused.

In *United States v. Prater*, the Court of Military Appeals went even further.<sup>35</sup> Not only did the court indicate that there was no specific constitutional or statutory right to speedy appellate review, it went on to say that even the general protections of the Fifth Amendment due process clause did not apply to appellate delay in the military. Specifically, the court stated:

Although this Court has declared that constitutional safeguards apply to military trials except insofar as they are made inapplicable expressly or by necessary implication (*United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960)), the Court has not held that the due process clause of the Fifth Amendment applies *ex proprio vigore* to appellate review of military trials. Speedy trial issues have been decided on the basis of military due process. *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964). In *United States v. Clay*, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74 (1951), the Court commented on military due process that: "For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress." Congress has legislated safeguards to the right of a speedy trial (Articles 10 and 33, Uniform Code of Military Justice, 10 USC §§ 810 and 833), but there are no statutory limitations on the period of appellate review other than those imposed on this Court by Article 67 of the Code.<sup>36</sup>

While a holding which denies application of the Fifth Amendment to the military may seem odd to modern military practitioners, one should remember that the UCMJ was barely twenty years old at the time of this opinion, and before that, there was no real right to judicial appellate review in the military justice system at all. Accordingly, the view that appellate rights come solely from Congress and not from the Constitution is not so surprising.

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<sup>35</sup> *United States v. Prater*, 43 C.M.R. 179 (C.M.A. 1971).

<sup>36</sup> *Id.* at 182.

The *Prater* court, however, did not foreclose all potential relief for unreasonable post-trial delay, holding that:

[w]here error has occurred in the conduct of a court-martial proceeding, some combinations of sentences and delays can result in cases requiring relief if a review for errors of law under Article 67, [UCMJ], is not to become a completely inane exercise. Unexplained appellate delays may demand a dismissal if prejudicial errors have occurred.<sup>37</sup>

The view that specific prejudice was required in order to remedy post-trial delay was reaffirmed two years later in *United States v. Timmons*.<sup>38</sup> After discussing the various cases which had required prejudice before granting relief, to include *Richmond* and *Prater*, the *Timmons* court concluded, “Whatever reason might exist to deplore post-trial delay generally, we are loath to declare that valid trial proceedings are invalid solely because of delays in the criminal process after trial.”<sup>39</sup>

The case of *Rhoades v. Haynes*, involved a petition for extraordinary relief filed by a marine, Sergeant Rhoades, in whose case action had not yet been taken four months after he was sentenced.<sup>40</sup> In commenting on its supervisory jurisdiction, the Court held:

When, upon application of a petitioner, a prima facie case of unreasonable delay in the appellate processes appears in a case over which we may obtain jurisdiction, this Court will take appropriate action to protect its power to grant meaningful relief from any error which might appear upon our ultimate review of the record of trial pursuant to Article 67(b)(3), [UCMJ]. In such an instance we will not determine responsibility for the delay, nor assess its impact upon substantial rights. Rather, except in the most extraordinary case,

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<sup>37</sup> *Id.* at 183.

<sup>38</sup> *United States v. Timmons*, 46 C.M.R. 226 (C.M.A. 1973).

<sup>39</sup> *Id.* at 227-28.

<sup>40</sup> *Rhoades v. Haynes*, 46 C.M.R. 189 (C.M.A. 1973).

we limit our action to the removal of the impediment and direct completion of the appellate processes. Depending on the convening authority's action, assessment of the delay is deferred until the case is reviewed by the Court of Military Review [now-Court of Criminal Appeals] or by this Court, pursuant to Articles 66 and 67 [UCMJ].<sup>41</sup>

The Court then ordered the convening authority to complete his action and file a copy with the Clerk of Court within seventeen days of the date of the opinion and, if the case required review by the then-Court of Military Review, that the record of trial be delivered to that court by the same date.<sup>42</sup> The power of the military courts to take action to stop post-trial delay before the normal appellate review process becomes significant when considering later cases.

In 1974, the Court of Military Appeals decided *Dunlap v. Convening Authority*, a case which has maintained considerable notoriety within the field of post-trial processing jurisprudence, but which strangely enough, seems to rest its holding on the premise that it may not actually be a post-trial delay case.<sup>43</sup> In a mixed plea case,<sup>44</sup> Private First Class (PFC) Dunlap was convicted by a court-martial in Bamberg, Germany, and immediately transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas.<sup>45</sup> The staff judge advocate noted several errors in his post-trial advice to the convening authority, to include not having a sufficient number of enlisted members on the court-martial panel, and

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<sup>41</sup> *Id.* at 190 (citing *Prater*, 43 C.M.R. at 179).

<sup>42</sup> *Id.*

<sup>43</sup> *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974).

<sup>44</sup> A mixed plea case is one in which the accused pleads guilty to some offenses and the government tries the accused on remaining offenses to which the accused plead not guilty.

<sup>45</sup> *Id.* at 752.

recommended that the convening authority only approve the findings to which Dunlap pled guilty and that there be a rehearing as to the sentence with a properly constituted panel.<sup>46</sup>

The convening authority requested that the Commanding General at Fort Leavenworth convene a rehearing as to the sentence rather than have Dunlap sent back to Germany. The legal staff at Fort Leavenworth, however, concluded that the improperly constituted panel rendered the entire court-martial invalid and that Fort Leavenworth would have to conduct a full rehearing for both findings and sentence but that they could only do so if the original convening authority in Germany amended his action to provide for such a rehearing.<sup>47</sup> The original convening authority amended his action accordingly and sent a request to Fort Leavenworth that they assume jurisdiction and retry Dunlap. The amended action and request for the assumption of jurisdiction was received by Fort Leavenworth ten months after Dunlap's original conviction.<sup>48</sup> Dunlap filed a petition in the United States District Court for the District of Kansas requesting that the charges against him be dismissed for violation of his right to a speedy trial, but the District Court stayed action until the Court of Military Appeals had an opportunity to address Dunlap's petition on the matter.<sup>49</sup>

In a two-to-one decision, the Court of Military Appeals directed that the charges against Dunlap be dismissed. The government argued that *Rhoades* had established that, in responding to a writ petition for relief, the Court was limited to "removal of the impediment"

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



and [directing] ‘completion of the appellate processes,’ with deferment of consideration of whether delay was prejudicial to the accused ‘until the case is reviewed’ on appeal.”<sup>50</sup> In response to this argument, the Court attempted to distinguish the earlier cases regarding post-trial delay by finding that the convening authority’s approval of the findings and sentence should actually be considered more as part of the trial process, rather than the post-trial process. Specifically, the Court stated:

[O]ur earlier cases in this area have proceeded on the unarticulated assumption that action by the convening authority on a record of conviction is the equivalent of appellate review, and such time is not generally included for purposes of calculating the period of delay in the prosecution. We have, however, recognized that the convening authority has “hybrid” functions. Some of his powers are of the kind associated with appellate review, but he has others affecting the findings of guilty and sentence that have the attributes of a trial court.

In the federal civilian criminal justice system, finality of verdict and sentence is established in the trial court. It has been held that sentence is an essential part of trial so that delay in its imposition may cause a deprivation of the right to a speedy trial. In military law, the ultimate legal effect of the findings of guilty determined by the court-martial and the sentence imposed upon it depends upon the action of the convening authority. ... In significant ways, therefore, the functions of the court-martial and those of the convening authority in the determination of guilt and in the imposition of sentence are so connected that they can be regarded as representing, for the purpose of speedy disposition of the charges, a single stage of the proceedings against the accused.<sup>51</sup>

The Court then noted that Article 10, UCMJ, requires that, when an accused is arrested or confined before trial, “immediate steps shall be taken ... to try him or to dismiss the charges and release him” and that “[t]o effectuate this congressional command for speedy disposition of a case, we vivified ‘a presumption of an Article 10 violation ... when pretrial

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<sup>50</sup> *Id.* at 753 (quoting *Rhoades*, 46 C.M.R. at 190).

<sup>51</sup> *Id.* (internal citations and quotations omitted).



confinement exceeds three months.”<sup>52</sup> The logical conclusion of this line of reasoning followed: “The interrelationship between the court-martial trial and the convening authority’s action gives arguable color to a construction of Article 10 that includes the convening authority’s action as one of the steps required in the trial of the accused.”<sup>53</sup>

After making its lengthy argument for why a convening authority’s action is conceptually part of the trial process, the Court oddly backed away from that argument and held that it was unnecessary to rely upon Article 10 in order to grant relief. Instead, it took a completely different tack. In an exceptional display of strained logic, the Court came to the conclusion that because Congress required the Court of Military Appeals to respond to petitions it received within 30 days by virtue of Article 67(c), “Congress has left no doubt that it desires that all proceedings in the military criminal justice system be completed as expeditiously as the circumstances allow. This Court is obligated to preserve and protect the integrity of its mandate for timely justice”<sup>54</sup> Using its newfound mandate, the Court put forth a new rule that “a presumption of a denial of a speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after

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<sup>52</sup> *Id.* (quoting UCMJ art. 10 and *United States v. Burton*, 44 C.M.R. 166, 172 (C.M.A. 1971)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 754. Article 67(c) is a relatively minor administrative provision which merely requires that, when an appellant petitions that CAAF (or the then-Court of Military Appeals) review his or her appeal, the Court must indicate whether it intends to review the case or deny the petition within 30 days. To conclude that this one requirement regarding a single step in the administrative processing of an appeal evidences a broad mandate from Congress for the Court to correct processing deficiencies at every stage of the criminal proceedings was a leap of gargantuan proportions.

completion of trial.”<sup>55</sup> Although such presumption was rebuttable by the government, “this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.”<sup>56</sup>

*Dunlap* is significant for both what it did and did not do. First of all, *Dunlap* did not get rid of the requirement that there be prejudice in order to grant relief, but rather, merely borrowed a rebuttable presumption of prejudice standard commonly found in pretrial Article 10 speedy trial cases. Additionally, although the opinion purported to rely upon a broad grant of authority from Congress to expedite the entire military criminal justice system and impose new standards for processing, it ultimately only affected delays occurring before the convening authority’s action. The rather lengthy discussion of why a convening authority’s action and the court-martial are effectively “a single stage of the proceedings,” the use of a presumption of prejudice standard previously only found in pretrial delay jurisprudence, and the heavy reliance on language from *Burton* was evidence that this holding was more grounded in pretrial Article 10 concepts than the Court cared to admit. In fact, four years later, the Court acknowledged just that.

In *United States v. Green*, the Court drew a clear distinction between pre-action delay and appellate delay and held that a showing of actual prejudice was still required to obtain relief for appellate delay.<sup>57</sup> In distinguishing *Dunlap*, the Court observed:

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (quoting *Burton*, 44 C.M.R. at 172).

<sup>57</sup> *United States v. Green*, 4 M.J. 203 (C.M.A. 1978).

The Court, [in *Dunlap*], held that unexplained delay by the convening authority in reviewing a conviction required dismissal of the charges. However, that determination was predicated upon the provisions of Article 10, [UCMJ], which requires dismissal as the sanction for unreasonable delay at the court-martial level, and the applicability of that article to the convening authority because of the conjunction of his responsibilities with those of the court-martial. *Dunlap*, did not, therefore, invalidate *Timmons* and its progeny; it only established their inapplicability to the delay occurring prior to the convening authority's action. The present case involves a delay at the appellate level, and the doctrine of *Timmons* still controls.<sup>58</sup>

It is important to note that in the brief span of time between *Dunlap* and *Green*, the entire makeup of the Court of Military Appeals had changed due to the death or retirements of the judges on the *Dunlap* court.<sup>59</sup> The new judges were not committed to the questionable logic upon which the *Dunlap* opinion was based, and thus, only five years after the *Dunlap* rule was established, the Court reversed itself and completely overruled *Dunlap* in *United States v. Banks*.<sup>60</sup>

The issue certified in *Banks* was “whether the rule established in [*Dunlap*] required automatic dismissal of charges in this case ‘where the accused received a fair trial free from error, was found guilty beyond a reasonable doubt, and where the delay of 91 days in the review of the conviction by the convening authority caused him to suffer absolutely no prejudice.’”<sup>61</sup> Noting that “[t]he certified question expresses the frustration of the services over the inflexibility of the *Dunlap* rule,” the *Banks* court concisely but diplomatically got rid of the *Dunlap* rule:

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<sup>58</sup> *Id.* at 204.

<sup>59</sup> See LURIE, *supra* note 8, at 295-96 and 321-25.

<sup>60</sup> *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).

<sup>61</sup> *Id.* at 92.

Upon full examination of the Uniform Code of Military Justice; the decisions of this Court preceding *Dunlap v. Convening Authority*; and with deference to the former members of this Court who formulated the *Dunlap* requirement, inflexible application of the rule to cases such as are included in the certified question shall not be required from and after the date of this decision.

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[I]n cases tried subsequent to this opinion, applications for relief because of delay of final action by the convening authority will be tested for prejudice.<sup>62</sup>

Rather than attack the logic relied upon by the then-deceased or retired members of the Court, the opinion merely stated, “No useful purpose would be served by reviewing the many cases and circumstances which convinced the *Dunlap* Court concerning the need for the rule announced therein. It will suffice to note that *Dunlap* came in response to a problem which frequently manifested itself where the convening authority delayed his final action.”<sup>63</sup> Thus, with little commentary, the *Dunlap* rule was gone as quickly as it appeared.

### III. *United States v. Tardiff*.

Following *Banks*, post-trial delay jurisprudence stabilized for the next twenty years, and the courts reviewed delay for unreasonableness on the part of the government with the ultimate requirement that there be actual prejudice in order for an appellant to be granted any relief for an unreasonable delay.<sup>64</sup> Just because they did not find prejudice, however, did not stop the courts from chastising the government for inexcusable delays and from urging the

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<sup>62</sup> *Id.* at 92-93 (citing *United States v. Gray*, 47 C.M.R. 484 (C.M.A. 1973)).

<sup>63</sup> *Id.* at 92 (citations omitted).

<sup>64</sup> See, e.g., *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993).

government to take steps to correct this recurrent problem. For example, in case of *United States v. Bell*, CAAF specifically noted:

We continue to be troubled by cases such as appellant's, where unexplained delays have occurred between the court-martial and the action of the convening authority. Nevertheless, our dissatisfaction with this aberrational military justice practice does not warrant setting aside a servicemember's punitive discharge when he or she was not substantially harmed. ... In the future, however, those responsible for prompt action in the military justice system must take better care to perform their duties as Congress and the President have directed.<sup>65</sup>

Unfortunately, without a showing of actual prejudice, these exhortations lacked any enforcement mechanism and apparently, went unheeded. Losing patience with its inability to deter increasingly slow post-trial processing, one panel of the Army Court of Criminal Appeals finally decided to do something about it.<sup>66</sup>

In 2000, a three-judge panel of the Army Court of Criminal Appeals decided the case of *United States v. Collazo*.<sup>67</sup> *Collazo* involved a delay of ten months from trial until the convening authority's final action in a case with a 519-page record of trial. The Court wasted no time in expressing its frustration with recurrent cases such as this:

The increasing number and regularity of other post-trial processing errors heighten our concern. These errors indicate a lack of attention to detail, a lack of understanding as to proper post-trial processing requirements, or a lack of urgency because the case is "post-trial" and there are no meaningful sanctions for tardy or sloppy work. Whatever the reason, this attitude has to change.<sup>68</sup>

Although the Court noted that previous cases required prejudice in order to grant relief and that *Collazo* had not demonstrated prejudice, it found that "fundamental fairness dictates that

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<sup>65</sup> *United States v. Bell*, 46 M.J. 351, 354 (1997).

<sup>67</sup> *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000).

<sup>68</sup> *Id.* at 725 n.4.



the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible ... ."<sup>69</sup> Citing its own authority under Article 66(c), UCMJ, to affirm only such findings of guilty and the sentence it determines should be approved, the Court held: "In our judgment, this is an appropriate case to exercise that authority. We will grant relief in our decretal paragraph in the form of a reduction to the sentence to confinement by four months."<sup>70</sup> The Court, however, did not explain how its exercise of this authority complied with the limitations of Article 59(a), UCMJ, in the absence of material prejudice to the accused.<sup>71</sup>

Shortly after the decision in *Collazo*, the government argued that the Court had no authority to grant relief for post-trial delays in the absence of prejudice. In *United States v. Bauerbach*, the same panel of the Army Court which issued *Collazo*, explained its rationale in detail.<sup>72</sup> Noting that the government questioned its ability to grant relief without prejudice, the Court responded that "[t]he government's position suggests a misunderstanding of this court's responsibility and authority to determine sentence appropriateness under Article 66(c)."<sup>73</sup> In starting its justification for its interpretation of the sentencing authority under Article 66, the Court started with a detailed recitation of the history of the UCMJ and the reasons why Congress chose to grant the service courts of criminal appeal broad powers of

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<sup>69</sup> *Id.* at 727.

<sup>70</sup> *Id.*

<sup>71</sup> See UCMJ art. 59(a).

<sup>72</sup> *United States v. Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001).

<sup>73</sup> *Id.* at 502.

review under Article 66(c), UCMJ.<sup>74</sup> After quoting from Article 66(c), that the service court “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact, and determines, on the basis of the entire record, should be approved,” the Court broke this authority into its three conceptual components, i.e., that of determining legal sufficiency, factual sufficiency, and sentence appropriateness.<sup>75</sup>

The Court then conceded that Article 59(a), which provides that “[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused,” limited the authority of the Court to reverse the sentence for an error of law, but held that this limitation did not apply to the Court’s ability to determine an appropriate sentence.<sup>76</sup> Moreover, because CAAF’s jurisdiction is limited to questions of law under Article 67, the Court held that any relief the service court granted in determining an appropriate sentence was final and nonreviewable.<sup>77</sup> In the final step of its reasoning, the Court held that it could use its “highly discretionary power” to determine what sentence should be approved to grant sentence relief in cases where there is no material prejudice or error of law.<sup>78</sup>

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<sup>74</sup> *Id.* at 502-03.

<sup>75</sup> *Id.* at 504.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 505.

<sup>78</sup> *Id.* at 505-06. The Court also stated that “[t]he government’s interpretation of Article 59(a), UCMJ, would limit our sentence appropriateness authority to situations involving a prejudicial error of law and would undermine our authority to reduce sentences that we found to be legal but inappropriate.” The Court, however, did not explain how the government’s position would possibly limit the ability of the Court to grant relief for a sentence that was too harsh for reasons unrelated to any errors of law.

Despite the fact that the *Bauerbach* court asserted that the power to grant relief for a nonprejudicial error of law had always existed within its Article 66 authority, the other service courts of criminal appeal did not follow its lead in exercising this newly discovered, but supposedly latent, authority. Indeed, even another panel of the Army Court of Criminal Appeals attempted to limit the scope of *Collazo* and *Bauerbach*.<sup>79</sup> The Navy-Marine Corps Court of Criminal Appeals and the Coast Guard Court of Criminal Appeals specifically disagreed with the *Collazo/Bauerbach* interpretation of Article 66(c). In an unpublished opinion, the Navy-Marine Court observed that, in *Collazo*, the Army Court of Criminal Appeals “broke new ground” by granting relief for an excessive post-trial delay where there was no showing of prejudice.<sup>80</sup> While acknowledging the temptation to follow the Army Court’s lead, the Court noted that its own case law continued to require prejudice in order to grant sentence relief for an error of law and that,

we recognize that the granting of a reduction of confinement when no prejudice has been demonstrated merely gives a windfall to an otherwise undeserving appellant, because someone tasked with the preparation and forwarding of either the record, recommendation, or action has not fulfilled his or her duty in a timely fashion. Rather than accord a windfall to an appellant, other deterrence against dilatoriness may be the appropriate remedy.<sup>81</sup>

Similarly, in *United States v. Greening* and *United States v. Tardiff*, the Coast Guard Court of Criminal Appeals refused to follow the Army Court’s lead.<sup>82</sup> In *Tardiff*, not only

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<sup>79</sup> *United States v. Harms*, 56 M.J. 755, 756 (Army Ct. Crim. App. 2002)(“To read [*Collazo* and *Bauerbach*] as establishing a judicial remedy for unreasonable post-trial delay, even in the absence of any prejudice to the appellant, is to accord them too broad a meaning.”).

<sup>80</sup> *United States v. Schell*, 2001 CCA LEXIS 332 (N-M Ct. Crim. App. Dec. 18, 2001)(unpub.).

<sup>81</sup> *Id.* (citing *United States v. Khamssouk*, 54 M.J. 742 (N-M Ct. Crim. App. 2001)).

<sup>82</sup> *United States v. Greening*, 54 M.J. 831, 832 (C.G. Ct. Crim. App. 2001); *United States v. Tardiff*, 55 M.J. 666 (C.G. Ct. Crim. App. 2001).

did it take almost eight months for the convening authority to take action following the court-martial, but there was an unexplained delay of four months in the routine administrative task of transmitting the record to the Coast Guard Court of Criminal Appeals.<sup>83</sup> Despite finding the delay to be both “unexplained and unreasonable,” the Court noted that “the Court of Appeals for the Armed Forces has repeatedly determined that an appellant must show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights.”<sup>84</sup> While Tardiff argued that the Court should follow the Army Court’s opinion in *Collazo*, the Coast Guard Court declined and stated that they would continue to follow the precedents from CAAF on the subject which required prejudice.<sup>85</sup> This was not the end of the matter, however, as Tardiff appealed the decision of the Coast Guard Court and CAAF granted the petition to consider the case.

On appeal, a 3-2 majority of CAAF adopted the Army Court’s reasoning from *Collazo* and *Bauerbach*, and held that the service courts had the power to grant relief for nonprejudicial post-trial delay under their Article 66(c) authority to determine an appropriate sentence.<sup>86</sup> The majority opinion first noted the long line of cases holding that an accused has the right to a timely review of his case.<sup>87</sup> After citing some of the cases which had held that relief for post-trial delay would not be granted absent a showing of prejudice under

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<sup>83</sup> *Tardiff*, 55 M.J. at 668.

<sup>84</sup> *Id.* at 668-69 (citing *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979); *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993); *United States v. Hudson*, 46 M.J. 226 (1997)).

<sup>85</sup> *Id.* at 669.

<sup>86</sup> *United States v. Tardiff*, 57 M.J. 219 (2002).

<sup>87</sup> *Id.* at 222 (citing *United States v. Tucker*, 26 C.M.R. 367,369 (C.M.A. 1958); *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971); *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974)).

Article 59(a), the Court found that those cases merely pertained to its own authority to grant relief under Article 67 and in no way related to the question of whether a service court of criminal appeals could grant relief under Article 66(c).<sup>88</sup> In distinguishing the authority of the service courts, the opinion quoted from both the congressional legislative history regarding Article 66 and the U.S. Supreme Court case of *Jackson v. Taylor*, both of which indicated that the military service courts may set aside any part of a sentence “either because it is illegal or because it is inappropriate.”<sup>89</sup> Then, following the rationale from the *Bauerbach* court, the majority held that, of the service courts’ three-part authority to determine legal sufficiency, factual sufficiency, and an appropriate sentence, Article 59(a) only affected the first, and that a service court could consider nonprejudicial post-trial delays in determining an appropriate sentence.<sup>90</sup>

In a strongly-worded dissent, Chief Judge Susan Crawford started:

The majority interprets Article 66(c) and 59(a) in a manner that is contrary to the principles of statutory construction and legislative intent, as well as inconsistent with 50 years of established practice and case law. ... Because the majority is engaging in broad judicial rulemaking by amending the Code to expand Article 66(c) and contract Article 59(a), and thereby essentially creating a power of equity in the court below, I must respectfully dissent.<sup>91</sup>

Chief Judge Crawford noted that the historical reasons for granting of broader powers to the then-Boards of Review in the UCMJ was to curb command influence and establish

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<sup>88</sup> *Id.* (citing *United States v. Williams*, 55 M.J. 302 (2001); *United States v. Hudson*, 46 M.J. 226 (1997); *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993); and *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979)).

<sup>89</sup> *Id.* at 223 (quoting S. REP. No. 98-486, at 28 (1949); *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957)).

<sup>90</sup> *Id.* at 224.

<sup>91</sup> *Id.* at 225-26 (Crawford, C.J., dissenting).



uniformity of sentences and not to grant windfalls due to technical errors.<sup>92</sup> She also observed that, in the fifty years since the creation of the UCMJ, neither CAAF nor any of the lower service courts had ever interpreted the Article 66(c) authority in the way that the *Collazo* court had.<sup>93</sup> Finding that the Court lacked the authority to create new rules regarding post-trial processing, Judge Crawford asserted that any such rules needed to be created by Congress or the President.

Senior Judge Sullivan also issued a separate dissent in which he joined in criticizing the majority's "judicial activism" and the creation of a "new equity-type supervisory power for the Courts of Criminal Appeal."<sup>94</sup> He went on to state:

Article 66(c) was not intended by Congress as a means for a subordinate court to evade or avoid unpopular legal precedent of this Court. This is neither the letter nor the spirit of Article 66(c), UCMJ, nor is it what the Supreme Court meant by the "power to determine sentence appropriateness." In my view, the service appellate court abuses its discretion when it exercises its sentence approval authority in deliberate derogation of our legal precedents. ... The sentence approval powers given to the service appellate courts are indeed unique, but it is equally clear that Congress did not envision them as a standardless supervisory remedy for judicially perceived inequities in the military justice system.<sup>95</sup>

Despite the vigorous dissents from the two senior-most judges on the Court and the disagreement of the other service courts, the majority in *Tardiff* sided with the view of the Army Court in *Collazo* and *Bauerbach* and essentially held that Article 59(a) did not apply to the service courts with respect to their sentencing authority.

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<sup>92</sup> *Id.* at 226.

<sup>93</sup> *Id.* at 227.

<sup>94</sup> *Id.* at 228 (Sullivan, S.J., dissenting).

<sup>95</sup> *Id.* at 230 (citing *Jackson v. Taylor*, 353 U.S. at 576; other citations omitted).

It is well known by both students of the law and legal practitioners that judges sometimes resort to strained interpretations of the law and faulty logic to reach the results they desire. There is no doubt that dilatory post-trial processing has plagued the military since the passage of the UCMJ and that the courts became increasingly frustrated at their inability to do anything about it in most cases due to the fact that, inexcusable as it was, delay at the appellate level rarely caused material prejudice to an appellant. Accordingly, when the *Collazo/Bauerbach* courts came upon a new, seemingly logical way of interpreting Article 66(c) so as to allow the service courts to stop these negligent practices, CAAF endorsed it. The problem is that the train of logic relied upon by both the Army Court and CAAF is flawed and contains gaps which were overlooked, whether intentionally or otherwise.

There are three basic steps to the *Collazo/Tardiff* line of reasoning. The first is that Article 66(c) permits a service court to reduce a sentence either due to an error of law or because it is inappropriate.<sup>96</sup> The second step is that, in exercising their authority to determine an appropriate sentence, a service court may consider the fact that the post-trial processing was unreasonably slow. The final step is the assertion that, because the service court is reducing the sentence because it is inappropriate and not because of the legal error, the limitation of Article 59(a) does not apply. At first glance, this reasoning may appear to be sound, and the first step in the train of logic (i.e., that a service court may reduce a

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<sup>96</sup> It should be noted that, while both CAAF and the Army Court referenced the service courts' authority to review for factual sufficiency, the doctrine of factual sufficiency actually only applies to affirmation of the findings of guilty and not to sentencing. To the extent the facts of the case may make a sentence seem excessive, those facts would be part of the traditional sentence appropriateness analysis.

sentence “either because it is illegal or because it is inappropriate”) is unquestioned.<sup>97</sup>

Unfortunately, the next two steps in the process are not so firmly rooted.

Unreasonable post-trial delay is unquestionably a legal error (i.e., a violation of due process), whether there is prejudice or not.<sup>98</sup> While neither CAAF nor the Army Court explicitly stated as much, the view that a service court can consider unreasonable post-trial delay as a factor in determining an appropriate sentence rests on the implicit premise that a service court can, in addition to reducing a sentence because it is either illegal or inappropriate, find that a sentence is inappropriate *because* it is illegal. It is here where the logic starts to break down and the *Collazo/Tardiff* holdings start to depart from the established jurisprudence. Both CAAF in *Tardiff* and the Army Court in *Bauerbach*, acknowledged that the authority of the service courts to grant relief due to an error of law is separate and distinct from their authority to determine an appropriate sentence.<sup>99</sup> Yet, inexplicably, neither court explains how you can merge these two separate and distinct authorities or how stating that a court may grant relief by finding a sentence inappropriate due to a legal error rather than granting relief for the legal error itself is anything other than a purely semantic difference. If a court reduces a sentence because it is inappropriate due to a legal error (i.e., unreasonable post-trial delay), then it is granting sentence relief on the ground of an error of law, regardless of how one chooses to characterize it.

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<sup>97</sup> See, e.g., S. REP. No. 98-486, at 28 (1949); *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957).

<sup>98</sup> Both civilian and military jurisprudence view excessive post-trial delay as a violation of due process. See *United States v. Toohey*, 60 M.J. 100, 102 (2004)(citing *Campiti v. Matesanz*, 186 F.Supp.2d 29 (D. Mass. 2002)(citing the seven federal circuits it found to have employed a due process analysis)).

<sup>99</sup> *Tardiff*, 57 M.J. at 223; *Bauerbach*, 55 M.J. at 504.

Significantly, in neither the legislative history nor in the long line of cases regarding the authority of a service court to determine an appropriate sentence under Article 66(c), is there any indication that the sentence appropriateness function included a consideration of nonprejudicial legal errors. Keeping in mind the historical background behind the passage of the UCMJ, the purpose in giving the service courts the authority to determine an appropriate sentence was to help alleviate the often harsh and inconsistent sentences that plagued the pre-UCMJ military justice system, such as that of Private Eddie Slovik. In the report prepared by the Forrestal committee on the draft UCMJ, which was later incorporated into both the House and Senate reports on the Code, the analysis of Article 66 notes that “[t]he Board [of Review] may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces.”<sup>100</sup>

Similarly, the military courts have always treated the authority to review a sentence for appropriateness as being separate and distinct from granting relief due to a legal error, and case law regarding the power of the service courts to determine an appropriate sentence never discussed consideration of nonprejudicial errors (or legal errors at all) as one of the factors to be used in a sentence appropriateness analysis. Rather, “[s]entence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves.”<sup>101</sup> As the Court of Military Appeals stated in *United States v.*

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<sup>100</sup> UNIFORM CODE OF MILITARY JUSTICE: TEXT, REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE, at 94 (1949); S. REP. No. 98-486 at 28 (1949); H. REP. No. 98-491 (1949); *see also Tardiff*, 57 M.J. at 226 (Crawford, C.J., dissenting)(quoting Committee report).

<sup>101</sup> *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).



*Snelling*, “Generally, sentence appropriateness should be judged by ‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offense and the character of the offender.’”<sup>102</sup> In interpreting the provision of Article 66(c) which states that the courts shall determine which part of the sentence, “on the basis of the entire record,” should be approved, the Court of Military Appeals in *United States v. Fagnan*, upheld the decision of the Board of Review to refuse to consider matters pertaining to the appellant’s good behavior in confinement and a psychiatric report prepared after trial.<sup>103</sup> Instead, the Board of Review held, “We consider that the sentence in this case is fully warranted ‘by the circumstances of the offense and *the previous record of the accused.*’”[Emphasis in original].<sup>104</sup> Clearly, the Court concluded that events occurring post-trial should not be made part of the sentence appropriateness analysis.

Even after its decisions in *Collazo* and *Bauerbach*, the Army Court of Criminal Appeals has continued to apply these same precedents in cases not involving post-trial delay. In *United States v. Mack*, the Court discussed its process as follows:

In determining sentence appropriateness, we must give “‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offense and the character of the offender.’” The appellant “should not receive a more severe sentence than otherwise generally warranted by the offense, the circumstances surrounding the offense, his acceptance or lack of acceptance of responsibility for his offense, and his prior record.

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<sup>102</sup> *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

<sup>103</sup> *United States v. Fagnan*, 30 C.M.R. 192 (C.M.A. 1961).

<sup>104</sup> *Id.* at 194 (quoting Board of Review and citing *United States v. Lanford*, 20 C.M.R. 87, 99 (C.M.A. 1955)).



Regardless of how sympathetic we may be, or how severe the collateral consequences of the appellant's dismissal, we are compelled to reiterate an earlier point: even though a case may cry out for clemency, we are powerless to grant it. Similarly, we are unwilling to cloak an emotional, equitable clemency argument in legal terms to achieve a particular result.<sup>105</sup>

Despite the fact that Mack raised several legal errors on appeal, the Court did not consider these as part of its sentence appropriateness analysis, and, in fact, rejected one of the asserted legal errors, in part, because Mack had not made a "colorable showing of possible prejudice."<sup>106</sup> Indeed, as one commentator has noted, even in post-trial delay cases after *Collazo*, the Army Court continued to analyze sentence appropriateness separately and then, granted relief for nonprejudicial post-trial delay with absolutely no discussion of how it may have affected the fairness of the sentence.<sup>107</sup> In fact, in one case, the Court found the sentence to be appropriate but went on to issue relief for post-trial delay anyway.<sup>108</sup> If the Court were truly considering the post-trial delay as part of its sentence appropriateness analysis and not just granting relief for a nonprejudicial legal error, one would have expected that the Court would have mentioned the post-trial delay as part of its sentence appropriateness discussion rather than bifurcating the two issues.<sup>109</sup>

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<sup>105</sup> *United States v. Mack*, 56 M.J. 786, 791-92 (Army Ct. Crim. App. 2002)(quoting *Snelling*, 14 M.J. at 268; *Mamaluy*, 27 C.M.R. at 180-81).

<sup>106</sup> *Id.* at 791 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (1998)).

<sup>107</sup> Major Timothy C. MacDonnell, *United States v. Bauerbach: Has the Army Court of Criminal Appeals Put "Collazo Relief" Beyond Review?*, 169 MIL.L.REV. 154, 163-64 (2001)(citing *United States v. Sharp*, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001)(unpub.); *United States v. Hansen*, No. 20000532 (Army Ct. Crim. App. May 10, 2001)(unpub.)).

<sup>108</sup> *Id.* at 164 (citing *Hansen*, *supra* note 107).

<sup>109</sup> *See id.*

The interplay between the authority to reduce a sentence due to a legal error or because it is inappropriate was discussed by the Court of Military Appeals in *United States v. Suzuki*.<sup>110</sup> In noting the distinct nature of these two authorities, the Court stated:

We start from the premise that, when a Court of Military Review [now-Court of Criminal Appeals] reassesses a sentence because of prejudicial error, its task differs from that which it performs in the ordinary review of a case. Under Article 66, [UCMJ], the Court of Military Review must assure that the sentence adjudged is appropriate for the offenses of which the accused has been convicted; and, if the sentence is excessive, it must reduce the sentence to make it appropriate. However, when prejudicial error has occurred in a trial, not only must the Court of Military Review assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also it must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. Only in this way can the requirements of Article 59(a), UCMJ, be reconciled with the Code provisions that findings and sentence be rendered by the court-martial.<sup>111</sup>

This discussion is notable in several respects. First, where there is prejudicial error, the Court indicates that the service court should ensure that the sentence is appropriate in light of the offenses, and then, make sure that the prejudicial errors have been properly remedied so that the sentence is no higher than would have been imposed but for the errors. This two-step process makes perfect sense. If one merged the sentence appropriateness determination and remedies for legal error, one could have incongruous results. For example, if there were a case with a legal error which caused definite and objective harm (e.g., failure to grant pretrial confinement credit), but the sentence was otherwise light, could the court refuse to grant sentence relief because the sentence was still appropriate even with the legal error? Certainly not. Obviously, the logical course of action is to determine the appropriate sentence in light

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<sup>110</sup> *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985).

<sup>111</sup> *Id.*

of all of the circumstances of the offense, and then, separately, determine whether any legal errors need to be remedied and reduce the sentence accordingly.

Note also that the *Suzuki* opinion discusses the consideration of *prejudicial* errors. Under the *Collazo/Tardiff* line of reasoning, however, the use of the qualifier “prejudicial” would be superfluous, as the sentence appropriateness analysis could necessarily include all legal errors, whether prejudicial or not. And because the sentence appropriateness determination could consider all legal errors, prejudicial or otherwise, it would be exempt from the limitation of Article 59(a), UCMJ. Obviously, however, the *Suzuki* court was operating under the assumption that nonprejudicial errors were not part of a service court’s consideration of an appropriate sentence and that remedies for legal error are subject to Article 59(a). This runs counter to the implication of the Army Court in *Bauerbach* that the ability to consider nonprejudicial errors had always existed within its Article 66(c) sentence appropriateness authority.<sup>112</sup> Additionally, the *Suzuki* court reaffirms the view that the sentence appropriateness determination is a consideration of the fairness of the sentence in light of the offenses committed and not a *carte blanche* power to reduce the sentence for whatever reasons a court views as justified.

Assuming, *arguendo*, that a service court does have the general authority to reduce a sentence because of unreasonable post-trial delay as part of its determination of an appropriate sentence, it does not explain how such authority could be exercised without

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<sup>112</sup> See *Bauerbach*, 55 M.J. at 502-04.

regard to the limitation of Article 59(a). For purposes of statutory interpretation, it is helpful to review the text of Articles 66(c) and 59(a) side-by-side. Article 66(c) provides:

In cases referred to it, the Courts of Criminal Appeal ... may affirm only such findings of guilty and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.<sup>113</sup>

Article 59(a) provides:

A finding or sentence of court-martial may not be held to be incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.<sup>114</sup>

The question, then, is how to relate these two articles. It is a fundamental rule of statutory interpretation that, when interpreting two statutory provisions, one should normally interpret them in such a way as to give maximum effect to both of them.<sup>115</sup> The easiest way to accomplish that goal with respect to Articles 66(c) and 59(a) is merely to put the word “but” or “however” between them. This results in the rule that a service court may only affirm a sentence that is legally correct and which it deems to be appropriate, but that it may not reduce the sentence due to an error of law that did not materially prejudice the substantial rights of the accused.

The *Collazo/Tardiff* interpretation of these articles, however, is that Article 59(a) does not apply to the service courts at all if the court indicates that it is reducing a sentence for legal error because it does not believe that it should be approved, even if there is no prejudice

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<sup>113</sup> UCMJ art. 66(c).

<sup>114</sup> UCMJ art. 59(a).

<sup>115</sup> *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971)(citing *Richards v. United States*, 369 U.S. 1 (1962)) (“It is a cardinal principle of statutory construction that whenever possible statutes are to be given such effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.”)).

to the accused. Obviously, an interpretation which essentially negates one of the statutory provisions in question does not accord with the basic rules of statutory interpretation.

Moreover, as Judge Crawford noted in her dissent in *Tardiff*, the fact that no court had ever put forth such an interpretation in the fifty years since the passage of the UCMJ is a strong indication that it is not the proper one.<sup>116</sup> In fact, just four years before the *Tardiff* decision, CAAF explicitly supported the interpretation that Articles 66(c) and 59(a) should be read together to “bracket” the authority of the service courts, to wit:

[W]hile the Courts of Criminal Appeals are not constrained from taking notice of otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse unless the error “materially prejudices the substantial rights of the accused.” Articles 59(a) and 66(c) serve to bracket their authority. Article 59(a) constrains their authority to reverse; Article 66(c) constrains their authority to affirm.

...

Article 59(a) limits military appellate courts from reversing a finding or sentence for legal error “unless the error materially prejudices the substantial rights of the accused.”<sup>117</sup>

Clearly, this interpretation does not jibe with that from *Tardiff* that Article 59(a) does not constrain the ability of a Court of Criminal Appeals to grant relief for nonprejudicial legal error.

One should remember, as well, that the breaking down of the Article 66(c) authority into its three components is a purely conceptual one, based upon a parsing of the fairly simple language contained within the article. Nowhere does Article 66(c) specifically say that there is a separate authority to determine an appropriate sentence; rather, Article 66(c)

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<sup>116</sup> *Tardiff*, 57 M.J. at 227 (Crawford, C.J., dissenting).

<sup>117</sup> *United States v. Powell*, 49 M.J. 460, 464-65 (1998).



says that the court “may affirm only such findings of guilty and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”<sup>118</sup> The conceptual authority to determine sentence appropriateness stems from the language “determines, on the basis of the entire record, should be approved.” If one assumes that there is unlawful post-trial delay and that the court wishes to grant sentence relief for the legal error, stating the relief in Article 66(c) terms, one would say that “the court is affirming part of the sentence because the original sentence is not correct in law (due to the unlawful post-trial delay) and that the court determines, accordingly, that it should only approve a reduced sentence.” Whether there exists material prejudice, which would limit the ability of the court to actually reduce the sentence on this ground, would be a separate analysis. Now, once again using the language from Article 66(c), if one assumes that there is unlawful post-trial delay and the court wishes to grant relief, but for sentence appropriateness reasons, one would say that “the court is affirming part of the sentence because the original sentence is not correct in law (due to the unlawful post-trial delay) and that the court determines, accordingly, that it should only approve a reduced sentence.” Note that, in Article 66(c) terms, the language used would be identical. Even if the court is relying upon its conceptual sentence appropriateness authority, it could not say that the sentence is correct in law because of the existence of the unlawful post-trial delay. The fact that Article 59(a) may ultimately limit the court’s ability to grant relief due to the lack of prejudice does not change how the relief would be stated for Article 66(c) purposes. This use of the plain text only further illustrates that point that finding a sentence inappropriate due to unreasonable post-trial delay is merely another way of saying that the sentence should not be approved on the ground of an error of law. The authority of a court to

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<sup>118</sup> UCMJ art. 66(c).

grant sentence relief should not hinge on the playing of conceptual word games and the breaking apart of otherwise plain language.

Additionally, there is no indication whatsoever in the legislative history of the UCMJ that Congress intended to exempt the service courts from Article 59(a). Because the UCMJ was such a dramatic change in the field of military justice and was creating a myriad of new procedural protections for servicemembers, there was understandable concern that all of these new rules may create legal loopholes and undeserved windfalls for criminals. Felix Larkin, a key member of Secretary Forrestal's committee on the UCMJ, testified regarding Article 59(a):

MR. BROOKS. And in reference to the term "error materially prejudices," exactly how far does that go?

MR. LARKIN. Well, it is provided do that there will not be a setting aside of a finding of guilty for technical reasons or for minor errors of law which do not prejudice the rights of the accused.

...

I think it is a common rule in civil practice and it has been generally applied in courts-martial. You can't try a case—the finest trial judge probably can't try a case—without making some technical error occasionally, but the error is so inconsequential that the substantial rights of the accused have not been prejudiced at all and there is no reason why the verdict should be set aside by virtue of minor or technical errors. If you have a substantial error or an error that prejudices his substantial rights, why then of course it should be set aside.

We have taken this from the statute and have emphasized it because we have as you have noticed made the trial of a case and the review of a case more legal in that we have required lawyers and we have required instructions to the court on the record.

Now we feel that it is progress to do that, but on the other hand we do not feel that anything is gained by making the system so technical that you can have reversals for minor technical errors. We feel strongly that you should not have reversals for errors of that character.<sup>119</sup>

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<sup>119</sup> *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1174-75 (1949).

Just two years after the passage of the UCMJ, the Court of Military Appeals observed:

It is clear, however, that Article 59(a), as well as other similar federal and state legislation, grew out of a widespread and deep conviction concerning the general course of review in American criminal cases, and the fear that our appellate courts in criminal cases had become in truth “impregnable citadels of technicality.”<sup>120</sup>

Allowing the Courts of Criminal Appeal to grant sentence relief for errors which do not materially prejudice a substantial right of the accused runs clearly against congressional intent in avoiding the creation of windfalls for accuseds who have not been harmed by legal errors in the processing of their case. Nowhere do the *Collazo* or *Tardiff* courts indicate why this policy does not apply to the service courts or where there is any indication in either the legislative history or fifty years of jurisprudence that the service courts had an exemption from the limitation of Article 59(a).

The simple answer is that neither the Army Court nor CAAF actually believed that the service courts had *carte blanche* authority to grant relief for nonprejudicial errors but that they used this reasoning as a pretext to justify taking measures against the increasing flow of post-trial delay cases. Strong evidence for this is the fact that no court, either before or since *Tardiff*, has used its sentence appropriateness authority to correct any nonprejudicial legal error other than post-trial delay. Logically speaking, there is no reason why the reasoning from *Collazo* and *Tardiff* should not apply to any legal error. If a service court can grant relief for nonprejudicial post-trial delay as part of its determination of an appropriate sentence, then why not grant relief for any other legal error without requiring prejudice? Certainly, there is nothing special about post-trial delay as a legal error to give it a special

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<sup>120</sup> *United States v. Lee*, 2 C.M.R. 118, 122 (C.M.A. 1952)(quoting *Kotteakos v. United States*, 328 U.S. 750, 759-60 (1946)).

exception to the requirements of Article 59(a), other than the fact that the judges became impatient with their inability to correct it. Despite the lack of a logical distinction, however, the courts have continued to require a showing of prejudice in order to grant sentence relief for all other legal errors.

In *United States v. Wheelus*, CAAF set forth the standards for determining whether an accused is entitled to relief regarding an error in the staff judge advocate's post-trial recommendation.<sup>121</sup> While noting a service court's "broad power to moot claims of prejudice," CAAF held:

The applicable statutory and Manual provisions, as well as our prior cases, establish the following process for resolving claims of error connected with the convening authority's post-trial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity.

...

Lastly, there are those cases where an appellant has not been prejudiced, even though there is clearly an error in the post-trial proceedings. If that be the case, then the Court of Criminal Appeals preferably should say so and articulate reasons why there is no prejudice.<sup>122</sup>

Despite the holding of *Tardiff*, which would allow the Courts of Criminal Appeal to grant relief for such an error regardless of the lack of prejudice, *Wheelus* continues to be followed as the proper standard for reviewing post-trial error cases.<sup>123</sup>

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<sup>121</sup> *United States v. Wheelus*, 49 M.J. 283 (1998).

<sup>122</sup> *Id.* at 288-89.

<sup>123</sup> See, e.g., *United States v. Capers*, 62 M.J. 268, 269 (2005); *United States v. Rosenthal*, 62 M.J. 261 (2005).



An interesting case is that of *United States v. Fagan*, decided a year-and-a-half after *Tardiff*.<sup>124</sup> In *Fagan*, the appellant alleged cruel and unusual punishment at the confinement facility and submitted an affidavit regarding the alleged abuses, which was rebutted by affidavits from the government.<sup>125</sup> Rather than remand the case back to the convening authority for a fact-finding hearing, the Army Court, in a move reminiscent of the *Collazo* case, decided to grant sentence relief under its “broad power to moot claims of prejudice.”<sup>126</sup> In rejecting this generous grant of relief, CAAF stated:

The exercise of the “broad power” referred to in *Wheelus* flowed from the existence of an acknowledged legal error or deficiency in the post-trial review process. It is not a “broad power to moot claims of prejudice” in the absence of an acknowledged error or deficiency, nor is it a mechanism to “moot claims” as an alternative to ascertaining whether a legal error or deficiency exists in the first place. ... However “broad” it may be, the “power” referred to in *Wheelus* does not vest the Court of Criminal Appeals with authority to eliminate that determination and move directly to granting sentence relief to *Fagan*. Rather, a threshold determination of a proper factual and legal basis for *Fagan*’s claim must be established before any entitlement to relief might arise.<sup>127</sup>

Therein lies the problem. If, as according to *Tardiff*, a service court’s authority to determine an appropriate sentence under Article 66(c) is distinct from its authority to correct errors of law, and if a service court can use its sentence appropriateness authority to correct a nonprejudicial post-trial legal error merely out of a sense of fairness, then why can it not find a sentence inappropriate to moot a possible, but unresolved, Eighth Amendment violation? Moreover, as the Army Court indicated in *Bauerbach*, a service court’s determination of an appropriate sentence is final and should not be subject to review by CAAF due to the

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<sup>124</sup> *United States v. Fagan*, 59 M.J. 238 (2004).

<sup>125</sup> *Id.* at 240.

<sup>126</sup> *Id.* at 244 (quoting *Wheelus*, 49 M.J. at 288).

<sup>127</sup> *Id.* at 244.



limitations of Article 67, even if the ultimate basis of the service court's determination is an error of law.<sup>128</sup> How then, did CAAF even have jurisdiction to question the Army Court's granting of sentence relief in *Fagan*? Simple—CAAF recognized that granting sentence relief for an error of law *is* different than granting relief because the sentence is inappropriate, and that granting relief for an error of law is subject to review. It should, therefore, also be subject to Article 59(a), UCMJ.

The bottom line is that the holding in *Tardiff* was an expedient to allow the service courts to curb the problem of unreasonable post-trial delay and was based on misleading logic and a rejection of fifty years of precedent. Yes, it is true that the service courts have broad authority to determine an appropriate sentence, and it is equally true that such determination is generally not subject to Article 59(a) when the reasons for the determination are a consideration of the individualized factual circumstances of an accused's offenses and whether the sentence is fair. But it is an entirely different matter to say that a sentence is inappropriate because of a legal error (in this case, unreasonable post-trial delay). In such a case, the court is not really determining an appropriate sentence in the traditional sense under the established jurisprudence, but rather, it is remedying a legal error. Regardless of whether the court says it is granting relief because the sentence is inappropriate due to the legal error or whether it is granting relief for the legal error, the end result is that the court is reversing a sentence "on the ground of an error of law," as specifically prohibited by Article 59(a), UCMJ. The fact that the courts have relied upon this faulty logic to correct only post-trial

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<sup>128</sup> See *Bauerbach*, 55 M.J. at 505.

delay errors is just more evidence that the purported reasons for the holding are not genuine and that the *Tardiff* opinion was only a means to an end.

#### IV. *United States v. Moreno* and *United States v. Toohey*.

The *Tardiff* opinion did not solve the problems with post-trial processing delay. Just because CAAF said that the service courts had the discretionary authority to remedy unreasonable post-trial delay, even without a showing of prejudice, did not mean that the service courts would choose to exercise this authority. This was particularly true of the service courts that had previously held that they did not actually have the authority to remedy post-trial delay without a showing of prejudice. Accordingly, CAAF started to explore ways in which it could remedy the problem of post-trial delay itself, notwithstanding the fact that it was, unlike like service courts, still subject to the limitation of Article 59(a), UCMJ. Over the next five years, CAAF would decide a series of cases, which taken together, dramatically changed the landscape of post-trial delay jurisprudence.

In 2003, CAAF decided the case of *Diaz v. The Judge Advocate of the Navy*, which involved a petition for extraordinary relief on the part of Diaz, who was still waiting for his appeal to be heard by the Navy-Marine Corps Court of Criminal Appeals.<sup>129</sup> Like the earlier case of *Rhoades v. Haynes*, discussed *supra*, Diaz used the extraordinary writ process seeking to expedite the post-trial review of his case.<sup>130</sup> Having first sought relief from the

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<sup>129</sup> *Diaz v. The Judge Advocate of the Navy*, 59 M.J. 34 (2003). Diaz actually filed a Motion for Appropriate Relief, but CAAF considered it as a properly-styled Petition for Extraordinary Relief.

<sup>130</sup> See *Rhoades v. Haynes*, 46 C.M.R. 189 (C.M.A. 1973), discussed *supra* pp. 14-15.

Navy-Marine Court, without success, Diaz petitioned CAAF because his assigned appellate defense counsel had possessed his case for a year-and-a-half, but had yet to submit a brief to the Navy-Marine Court, citing an excessive caseload as the reason behind her continued requests for enlargements of time in which to file.<sup>131</sup> After his original appellate counsel received eleven enlargements of time, Diaz was appointed a new appellate defense counsel, who indicated to the Court that there was “little hope of [Diaz’s] case being exhaustively read and the appellate issues briefed anytime soon given the present workload of the current Appellate Defense Counsel.”<sup>132</sup> The new appellate defense counsel also indicated that the average workload of counsel at the Navy-Marine Corps Appellate Defense Division was “70 cases comprising [an] average total of 18,100 pages of trial transcript.”<sup>133</sup>

Noting that Diaz had a legal right to government-provided appellate counsel under Article 70, UCMJ, and that he had a constitutional right to prompt appellate review under the Due Process Clause of the Fifth Amendment, CAAF found that Diaz was “not being afforded an appellate review of his findings and sentence that comports with the requirements of Article 66 and Article 70. These rights must be recognized, enforced, and protected by the Government, by the appellate attorneys, by the Court of Criminal Appeals, and by this Court.”<sup>134</sup> Accordingly, CAAF ordered that the Navy-Marine Court expeditiously review

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<sup>131</sup> *Diaz*, 59 M.J. at 35.

<sup>132</sup> *Id.* at 36.

<sup>133</sup> *Id.* at 36-37.

<sup>134</sup> *Id.* at 37-39 (citing *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994); *Evitts v. Lucey*, 469 U.S. 387 (1985); *United States v. Antoine*, 906 F.2d 1379 (9th Cir. 1990); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238 (N.D. Ill. 1996)).

Diaz's appeal, that it take appropriate action to ensure that the pleadings in the case are filed in a timely fashion, and that the Navy-Marine Court submit a report to CAAF within 60 days indicating the steps it had taken to comply with CAAF's orders.<sup>135</sup>

Shortly after the decision in *Diaz*, another servicemember awaiting review of his case by the Navy-Marine Court filed a Petition for Extraordinary Relief.<sup>136</sup> Almost six years had passed since Marine Staff Sergeant Toohey's court-martial and his appeal had still not been decided by the Navy-Marine Corps Court of Criminal Appeals.<sup>137</sup> Staff Sergeant Toohey's case was a model of how not to process a case post-trial, with excessive delays at virtually every step of the process—from the transcription of the record, the preparation of the staff judge advocate's recommendation and the convening authority's action, and even the normally routine task of forwarding the completed record to the service court of criminal appeals.<sup>138</sup>

In ruling on Toohey's petition, CAAF found that the Due Process Clause of the Fifth Amendment guaranteed the right to a speedy post-trial review and noted that several federal Courts of Appeal had taken the same position.<sup>139</sup> In resolving claims of post-trial appellate

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<sup>135</sup> *Id.* at 40.

<sup>136</sup> *See United States v. Toohey*, 60 M.J. 100 (2004).

<sup>137</sup> *Id.* at 101.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 102 (quoting *Campiti v. Matesanz*, 186 F.Supp.2d 29, 43 (D. Mass. 2002) ("Although the Supreme Court has not addressed appellate delay in the due process context, seven of the Courts of Appeal have held that an appellate delay may constitute a due process violation under some circumstances.")). Actually, as will be discussed *infra*, there appear to be nine federal Courts of Appeal which have taken this position, not counting CAAF.



delay, the federal courts use a modified version of the four-part test, adopted from the pretrial speedy trial case of *Barker v. Wingo*, which considers: “(1) length of the delay; (2) reasons for the delay; (3) the appellant’s assertion of his right to a timely appeal; and (4) prejudice to the appellant.”<sup>140</sup> Then, quoting a case from the U.S. Court of Appeals for the Sixth Circuit regarding the length of the delay, CAAF wrote, “Second, if the constitutional inquiry has been triggered, the length of the delay is itself balanced with the other factors and may, in extreme circumstances, give rise to a strong ‘presumption of evidentiary prejudice’ affecting the fourth *Barker* factor.”<sup>141</sup> Rather than apply these factors to the case at hand, however, CAAF chose to remand the case back to the Navy-Marine Court to determine whether Toohey’s Fifth Amendment right to due process had been violated.<sup>142</sup> The reasons given by CAAF for remanding the case are worthy of note, as the Court indicated:

A second reason why we should allow the Navy-Marine Corps Court to resolve this issue arises from that court’s unique powers under Article 66(c). Prejudice is a clear requirement for an Article III [civilian] court to provide relief for unreasonable post-trial delay. Our review involves a determination of whether a prejudicial error of law occurred. The Courts of Criminal Appeals, however, possess broader powers. They may issue relief upon a finding that lengthy delay following a court-martial conviction renders some portion of the findings or sentence inappropriate. Even if it finds that the delay in this case does not rise to the level of a prejudicial error of law—a matter about which we express no opinion—the Navy-Marine Corps Court has the authority to nevertheless conclude that some form of relief is appropriate.<sup>143</sup>

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<sup>140</sup> *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Hawkins*, 78 F.3d 348, 350 (8th Cir. 1996); *Hill v. Reynolds*, 942 F.2d 1494, 1497 (10th Cir. 1991); *United States v. Antoine*, 906 F.2d 1379 (9th Cir. 1990); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1981); *United States v. Johnson*, 732 F.2d 379, 381-82 (4th Cir. 1980)).

<sup>141</sup> *Id.* (quoting *United States v. Smith*, 94 F.3d 204, 209 (6th Cir. 1996)(quoting *Doggett v. United States*, 505 U.S. 647, 657 (1992)).

<sup>142</sup> *Id.* at 104.

<sup>143</sup> *Id.* at 103-04 (citing *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1158 (1st Cir. 1995); *Harris v. Champion*, 15 F.3d 1563-64 (10th Cir. 1994)).



Following its decision in *Tardiff*, this holding may not seem so surprising. The Court observes, correctly, that the civilian federal courts all require a showing of actual prejudice before granting relief for post-trial delay, that its own review is limited to errors of law and is subject to the limitation of Article 59(a), UCMJ, but that the service court has discretionary authority to give sentence relief for nonprejudicial post-trial delay in light of *Tardiff*. This holding, however, and the assumptions contained therein, will dramatically change when Toohey's case returns to CAAF in the regular course of the appellate review process and following CAAF's intervening opinion in *United States v. Moreno*.

Also of interest is CAAF's statement regarding a lengthy delay, in extreme circumstances, creating a "strong 'presumption of evidentiary prejudice,'" which is an indirect quote from the U.S. Supreme Court case of *Doggett v. United States*.<sup>144</sup> CAAF also uses this exact quote one year later in the case of *United States v. Jones*.<sup>145</sup> While this quote ended up not being of much significance in responding to Toohey's petition or in *Jones*, it provides some insight into CAAF's desire to find a way to have a presumptively prejudicial delay without the requirement for proving actual prejudice. This becomes significant in future cases, and thus, warrants some further discussion.

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<sup>144</sup> *Id.* at 102 (quoting *Smith*, 94 F.3d at 209 (quoting *Doggett*, 505 U.S. at 657)).

<sup>145</sup> *United States v. Jones*, 61 M.J. 80, 83 (2005). In *Jones*, CAAF grants relief for unreasonable post-trial delay, but does so upon a finding of actual prejudice.

*Doggett* was a Sixth Amendment pretrial speedy trial case involving a delay of eight-and-half years between *Doggett*'s indictment and his arrest and subsequent trial.<sup>146</sup> Even though *Doggett* could point to no specific prejudice caused to him by the delay, the U.S. Supreme Court, in a 5-4 decision, reversed his conviction, finding the delay to be presumptively prejudicial and a violation of his Sixth Amendment right to a speedy trial.<sup>147</sup> The majority reached its decision due to concerns that such a long delay "presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify," and that "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'"<sup>148</sup>

CAAF cites the Sixth Circuit case of *United States v. Smith* for the proposition that the *Doggett* presumption of prejudice can be applied in a post-trial delay context.<sup>149</sup> Of the nine circuits which have considered appellate post-trial issues, the Sixth Circuit is the only one that has applied *Doggett* to the post-trial context, and even it has recently backed away from that position.<sup>150</sup> Furthermore, in *Smith*, the Sixth Circuit found that "the presumptive prejudice arising out of the three-year delay in this case, if any, is negligible at best. ... Moreover, we conclude that the prejudice does not even make it as far as the balancing test, because the government has successfully rebutted any discernible presumption in this case:

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<sup>146</sup> *Doggett*, 505 U.S. at 650.

<sup>147</sup> *Id.* at 531-32.

<sup>148</sup> *Id.* at 530-31 (quoting *Barker*, 407 U.S. at 532).

<sup>149</sup> *Toohey*, 60 M.J. at 102 (quoting *Smith*, 94 F.3d at 209).

<sup>150</sup> See *United States v. Gray*, 52 Fed. Appx. 650, 654 (6th Cir. 2002)(unpub.)( "[N]one of the decisions of this or any other circuit applying *Barker* to the appellate context has granted a due process speedy appeal motion absent a significant showing of prejudice." ).

there can be no doubt that Smith's ability to defend himself at resentencing has remained wholly unimpaired."<sup>151</sup> This is important because it shows that, not only did the Sixth Circuit view the *Doggett* presumption of prejudice as being subject to rebuttal by the government if it could show that there was no way that the accused would be prejudiced at a rehearing, but the Court's rationale shows that the *Doggett* presumption should only come into play if there actually is a need for a rehearing or retrial.

The Tenth Circuit Court of Appeals recognized the theoretical possibility that a *Doggett* presumption could come into play in extreme circumstances in the 1994 case of *Harris v. Champion*, but stated that, "we agree with the Ninth Circuit that, ordinarily, a petitioner must make some showing on the fourth factor—prejudice—to establish a due process violation."<sup>152</sup> Like the Sixth Circuit, however, the Tenth Circuit has recently backed away from the use of any *Doggett* presumption, finding that the Barker analysis changes following a conviction:

We observed in *Perez* that once a defendant has been convicted, the rights of society increase in proportion to the rights of the defendant. Post-conviction prejudice therefore "must be substantial and demonstrable."

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Additionally, we have indicated the necessity of showing substantial prejudice dominates the *Barker* balancing test once a defendant has been convicted.<sup>153</sup>

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<sup>151</sup> *Smith*, 94 F.3d at 212.

<sup>152</sup> *Harris v. Champion*, 15 F.3d 1538, 1559 and 1565 (10th Cir. 1994)(citing *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993)).

<sup>153</sup> *United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006)(quoting *Perez v. Sullivan*, 793 F.2d 249, 256 (10th Cir. 1986)).

The Ninth Circuit Court of Appeals has stated it even more pointedly:

In short, we are not persuaded that extreme appellate delay generally threatens to prejudice a defendant's ability to defend himself on retrial "in ways that [he] cannot prove or, for that matter, identify." In this respect, we deem *Doggett* inapposite, and therefore conclude that it would be inappropriate to afford all appellate delay claimants the benefit of an automatic presumption of prejudice.<sup>154</sup>

Thus, we can see that CAAF's application of the *Doggett* presumption to an appellate context was without support, as the only two circuits that even gave the presumption lip service either noted it as merely an extreme possibility or allowed it to be rebutted by a clear showing that there was, in fact, no actual prejudice. Regardless, as noted above, both circuits appear to have since given up on *Doggett* altogether. As we will soon see, CAAF itself appears to back away from the use of *Doggett*, only to find other ways of attacking the problem of excessive post-trial delay.

The next step in the evolution of CAAF's post-trial delay jurisprudence was the case of *United States v. Moreno*.<sup>155</sup> Corporal Moreno was convicted of rape and sentenced to confinement for six years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.<sup>156</sup> In addition to his assertion that one of his panel members was unlawfully biased, Moreno argued that the 1,688 days that it took from his conviction until a decision was issued by the Navy-Marine Corps Court of Criminal Appeals constituted unreasonable post-trial delay for which he should be given relief.<sup>157</sup> In analyzing

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<sup>154</sup> *United States v. Mohawk*, 20 F.3d 1480, 1488 (9th Cir. 1994)(quoting *Doggett*, 505 U.S. at 657); see also *Elcock v. Henderson*, 28 F.3d 276, 279 (2d Cir. 1994)(*Doggett* inapplicable to claims of appellate delay).

<sup>155</sup> *United States v. Moreno*, 63 M.J. 129 (2006).

<sup>156</sup> *Id.* at 132.

<sup>157</sup> *Id.* at 135.

Moreno's assertion of post-trial delay, CAAF again turned to the modified Barker factors it espoused in *Toohey*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice."<sup>158</sup> Citing *Barker*, CAAF stated:

Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation.

...

No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.<sup>159</sup>

The significance of this quote should be readily apparent, as prejudice is one of the four factors in the *Barker* analysis.

The Court then turned to analyzing the case under the four factors. Regarding the length of the delay, CAAF stated that "[w]e conduct a case-by-case analysis to determine if a given delay is facially unreasonable" and then concluded that the 1,688-day delay in Moreno's case was facially unreasonable.<sup>160</sup> During this discussion, CAAF dropped the following footnote:

In the speedy trial context, "extreme cases of delay would produce a strong presumption of prejudice to the ability of the party to defend itself at trial ... ."

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<sup>158</sup> *Id.* (citing *United States v. Toohey*, 60 M.J. 100, 102 (2004); *United States v. Jones*, 61 M.J. 80, 83 (2005)).

<sup>159</sup> *Id.* at 136 (citing *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990)). The cite and parenthetical from *Simmons* was slightly disingenuous because four years later, the Second Circuit explicitly held that a showing of actual prejudice is required to establish a due process violation for appellate delay. See *Elcock*, 28 F.3d at 279.

<sup>160</sup> *Id.* at 136.



Circuit courts have split on whether the Doggett presumption of prejudice is applicable to a due process appellate delay analysis.<sup>161</sup>

As discussed *supra*, however, to say that there was a “split” between the circuits was a bit of a stretch given that only two of the nine circuits applying the modified Barker factors to the post-trial context had ever recognized even a possibility of applying the Doggett presumption of prejudice and both the *Smith* and *Harris* cases cited by CAAF seriously limited the application thereof. Moreover, both circuits have since backed away from use of *Doggett* in appellate delay cases, although in defense of CAAF, the Tenth Circuit’s apparent rejection of the use of *Doggett* did not occur until after *Moreno* was decided.<sup>162</sup> As it turns out, however, CAAF’s reference to the Doggett presumption of prejudice will not be relevant to CAAF’s ultimate resolution of the post-trial delay issue.

Turning to the next Barker factor, the reasons for the delay, CAAF stated that it would examine each step of the post-trial period separately to determine what reasons the government had for the delay.<sup>163</sup> In this case, the Court noted that the 490 days between the end of the trial and the convening authority’s action, the 76 days between action and docketing the case with the Court of Criminal Appeals, and the 925 days between docketing of the case and the completion of appellate briefs were all excessive.<sup>164</sup> Most interestingly, CAAF concluded that the entire delay at the briefing stage was ultimately attributable to the

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<sup>161</sup> *Id.* (citing *United States v. Smith*, 94 F.3d 204, 211 (6th Cir. 1996) and comparing *Smith* and *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994) with *United States v. Mohawk*, 20 F.3d 1480 (9th Cir. 1994)).

<sup>162</sup> See *United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006); *United States v. Gray*, 52 Fed. Appx. 650, 654 (6th Cir. 2002)(unpub.).

<sup>163</sup> *Moreno*, 63 M.J. at 136.

<sup>164</sup> *Id.* at 136-37.

government, despite the fact that appellate defense counsel requested eighteen enlargements of time (almost two years).<sup>165</sup> Citing its opinion in *Diaz*, the Court found that burdensome appellate caseloads are the responsibility of the government and that the government must, therefore, be held responsible for any delays caused by such.<sup>166</sup>

As to the third factor, the appellant's assertion of his right to a timely review, the Court found that Moreno did not object to any delay, but held that "[w]e do not believe this factor weighs heavily against Moreno under the circumstances of this case. The obligation to ensure a timely review and action by the convening authority rests upon the Government and Moreno is not required to complain in order to receive timely convening authority action."<sup>167</sup> Continuing, the Court stated:

We also recognize the paradox of requiring Moreno to complain about appellate delay either to his appellate counsel who sought multiple enlargements of time because of other case commitments or to the appellate court that granted the enlargements on a routine basis. While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.<sup>168</sup>

Turning to the final factor of prejudice, the Court adopted the modified standard for examining prejudice, taken by the federal appellate courts from the analysis in *Barker*, to wit:

In the case of appellate delay, prejudice should be assessed in light of the interests of those convicted of crimes to an appeal of their conviction unencumbered by excessive delay. We identify three similar interests for prompt appeals: (1)

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 138.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in the case of reversal and retrial, might be impaired.<sup>169</sup>

The first sub-factor (i.e., oppressive incarceration pending appeal) is fairly simple. As CAAF explained, “[t]his sub-factor is directly related to the success or failure of an appellant’s substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive.”<sup>170</sup> Essentially, this sub-factor just considers the obvious injustice to an appellant who has to suffer through unreasonable delay before being granted relief for an actual legal error. Unless an appellant prevails on an asserted legal error other than simply the issue of post-trial delay, this sub-factor is not triggered. Similarly, the third sub-factor (i.e., impairment of one’s ability to present a defense at a rehearing) cannot be triggered unless the appellant is successful in the assertion of substantive legal error and there is, in fact, a rehearing or retrial. Additionally, “[i]n order to prevail on this factor an appellant must be able to specifically identify how he would be prejudiced at rehearing due to the delay.”<sup>171</sup>

While the first and third sub-factors in this prejudice analysis reflect obvious harm to an appellant who prevails upon appeal after an extended and unnecessary delay, the second sub-factor (i.e., minimization of anxiety and concern of those awaiting appeal) is far more amorphous. CAAF noted that the federal circuits were taking different approaches with

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<sup>169</sup> *Id.* at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1981) and citing *United States v. Hawkins*, 78 F.3d 348, 351 (8th Cir. 1996); *Coe v. Thurman*, 922 F.2d 528, 532 (9th Cir. 1990); and *Harris v. Champion*, 15 F.3d 1538, 1547 (10th Cir. 1994)).

<sup>170</sup> *Id.* at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)).

<sup>171</sup> *Id.* at 140 (citing *United States v. Mohawk*, 20 F.3d 1480, 1487 (9th Cir. 1994)).

respect to this sub-factor, with the Third, Ninth, and Tenth Circuits requiring a showing of some form of detailed or particularized anxiety related to the post-trial processing of the case and the Second Circuit affirming district court cases finding this sub-factor to be triggered merely by the existence of an unusually long delay.<sup>172</sup> The Court then observed that, “[w]hile some circuits require that an appellant have a meritorious appeal to prevail on this sub-factor, *see id.*, others have recognized anxiety arising from excessive delay regardless of whether the appellant prevails on a substantive issue.”<sup>173</sup>

Ultimately, CAAF held that:

[T]he appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. This particularized anxiety or concern is thus related to the timeliness of the appeal, requires an appellant to demonstrate a nexus to the processing of his appellate review, and ultimately assists this court to “fashion relief in such a way as to compensate [an appellant] for the particular harm.” We do not believe that the anxiety that an appellant may experience is dependent upon whether his substantive appeal is ultimately successful.<sup>174</sup>

The Court then went on to find that Moreno had suffered a constitutional level of anxiety for purposes of this sub-factor because he had been forced to register as a sex offender upon his release from confinement—anxiety which was exacerbated by the excessive post-trial delay and the fact that Moreno was ultimately granted a rehearing due to the meritorious implied

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<sup>172</sup> *Id.* at 139-40 (citing *United States v. Antoine*, 906 F.2d 1379, 1383 (9<sup>th</sup> Cir. 1990); *Coe v. Thurman*, 922 F.2d 528, 532 (9<sup>th</sup> Cir. 1990); *Burkett v. Fulcomer*, 951 F.2d 1431, 1447 (3d Cir. 1991); *Harris*, 15 F.3d at 1565; *Yourdon v. Kelly*, 969 F.2d 1042 (2d Cir. 1992)(table decision), *aff’g* 769 F.Supp. 112, 115 (W.D.N.Y. 1991); *Snyder v. Kelly*, 972 F.2d 1328 (2d Cir. 1992)(table decision), *aff’g* 769 F.Supp. 108, 111 (W.D.N.Y. 1991)). Whether the Second Circuit cases cited actually stand for the proposition which CAAF claims they do is another matter which will be discussed *infra*.

<sup>173</sup> *Id.* at 140 (citing *Snyder*, 769 F.Supp. at 111). It is not entirely clear to which case(s) CAAF is citing by its “*see id.*,” but it appears to be the Third, Ninth, and Tenth Circuit cases cited *supra* n. 172.

<sup>174</sup> *Id.* (quoting *Burkett*, 951 F.2d at 1447).



bias error found with respect to his panel composition.<sup>175</sup> Based upon its finding of prejudice, when balanced with the other Barker factors, CAAF determined that Moreno's constitutional right to due process was violated and, as relief, decreed that the convening authority could not approve any portion of the sentence exceeding a punitive discharge if Moreno were convicted at his retrial.<sup>176</sup>

This was not the end of the story, however. Having conceptually expanded its own authority to review and remedy excessive post-trial delay, CAAF opted to take the next step and promulgate objective standards to be used in considering future post-trial delay cases. The Court pointed to the fact that, in *Dunlap*, it had previously adopted a "presumption of a denial of speedy disposition of the case" for failure of a convening authority to take action within ninety days of trial.<sup>177</sup> It then quoted part of the decision in *Banks*, reversing *Dunlap*, which indicated the Court's belief, at that time, that "convicted service persons now enjoy protections which had not been developed when *Dunlap* was decided. ... Thus, the serviceman awaiting final action by the convening authority may avail himself of remedies during the pendency of his review which were not clear when *Dunlap* was decided."<sup>178</sup> CAAF then noted that the extra protections cited by the *Banks* court had done little to stem the flow of excessive post-trial delay, implying that the use of strict *Dunlap*-like rules was again appropriate.<sup>179</sup> Thus, CAAF found a way to invoke the authority from the brief and

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 141 and 144.

<sup>177</sup> *Id.* at 141 (quoting *Dunlap v. Convening Authority*, 48 C.M.R. 751, 754 (C.M.A. 1974)).

<sup>178</sup> *Id.* at 141-42 (quoting *United States v. Banks*, 7 M.J. 92, 93 (C.M.A. 1979)).

<sup>179</sup> *Id.* at 142.



oft-criticized *Dunlap* era in order to take more aggressive measures against the problem of post-trial delay.

There are, of course, two major flaws with this line of reasoning. First, it assumes that the only reason the *Banks* court overruled *Dunlap* was because of the intervening administrative protections and not because the holding in *Dunlap* was based upon a misapplication of Sixth Amendment jurisprudence. As discussed herein *supra*, such an assumption is probably not a wise one. More importantly, however, CAAF ignores the fact that *Dunlap* explicitly limited its strict measures to activities occurring before convening authority action because the entire holding of the case was premised on the theory that delay occurring before action was not actually post-trial delay, but rather, should be considered as pretrial delay so as to invoke the stricter Sixth Amendment pretrial standards. Consequently, invoking *Dunlap* as precedent for imposing rigid rules regarding *post-trial* delay is misguided and overlooks the actual legal rationale upon which *Dunlap* was based.

Regardless, CAAF found that “some action is necessary to deter excessive delay in the appellate process and remedy those instances in which there is unreasonable delay and due process violations,” and held accordingly:

For courts-martial completed thirty days after the date of this opinion, we will apply a presumption of unreasonable delay that will serve to trigger the Barker four-factor analysis where action of the convening authority is not taken within 120 days of the completed trial. We will apply a similar presumption of unreasonable delay ... where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority’s action.

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For those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision, we will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals. These presumptions of unreasonable delay will be viewed as satisfying the first Barker factor and they will apply whether or not the appellant was sentenced to or serving confinement.<sup>180</sup>

At first glance, these deadlines appear to be disturbingly rigid, but the Court immediately made it clear that these presumptions are not dispositive *per se*: “It is important to note that the presumptions serve to trigger the four-part Barker analysis—not resolve it. The Government can rebut the presumption by showing the delay was not unreasonable.”<sup>181</sup> Assuming that an appellate court finds, after a review of the four Barker factors, that there was a denial of due process with respect to post-trial processing, the appellate court “should ‘tailor an appropriate remedy, if any is warranted, to the circumstances of the case.’”<sup>182</sup>

*Moreno* was a significant case in the area of post-trial delay jurisprudence, but not for the reasons that many immediately assumed. The new temporal guidelines did not actually change anything except for requiring an appellate court to analyze the case using the Barker factors—something it was already required to do, even if a court did not explicitly set forth its analysis. The Court’s holding, however, signaled its extreme displeasure at the continuing trend of lengthy post-trial processing and served as an implied threat at even stronger measures that might be forthcoming. Indeed, the Court stated not so subtly:

We believe that adopting the Doggett presumption of prejudice is unnecessary at this point. We can deter these delays and address the systemic delays we

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 143.

see arising in post-trial and appellate processing through less draconian measures. *See Simmons*, 898 F.2d at 869. Although we do not foreclose the possibility that presumptions of prejudice may yet prove necessary, we do not believe it is necessary to adopt such a presumption at this juncture.<sup>183</sup>

The fact that the Court obviously believed that it could impose a presumption of prejudice if it so desired, and the Court's statements that none of the Barker factors (of which prejudice is one) were dispositive to resolution of a due process claim, were far more problematic because they indicated that CAAF did not view itself to be constrained any longer by the traditional limit of Article 59(a), UCMJ, which requires a finding of prejudice before relief can be granted. As it turned out, *Moreno* set the stage for CAAF's next step in the direction of avoiding Article 59(a), and that step was taken a mere three months after the decision in *Moreno*, when the Court reconsidered the *Toohey* case during the normal course of its appeal.

As discussed, *supra*, CAAF had remanded Toohey's case back to the Navy-Marine Corps Court of Criminal Appeal to consider whether the excessive post-trial delay in that case amounted to a violation of the Fifth Amendment.<sup>184</sup> The remand had been prompted by CAAF's acknowledgement that, at least post-*Tardiff*, a service court of criminal appeals had greater authority to remedy non-prejudicial post-trial delay:

A second reason why we should allow the Navy-Marine Corps Court to resolve this issue arises from that court's unique powers under Article 66(c). Prejudice is a clear requirement for an Article III [civilian] court to provide relief for unreasonable post-trial delay. Our review involves a determination of whether a prejudicial error of law occurred. The Courts of Criminal Appeals, however, possess broader powers.<sup>185</sup>

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<sup>183</sup> *Id.* at 142.

<sup>184</sup> *See supra* p. 47.

<sup>185</sup> *United States v. Toohey (Toohey I)*, 60 M.J. 100, 103 (2004) (citing *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1158 (1st Cir. 1995); *Harris v. Champion*, 15 F.3d 1563-64 (10th Cir. 1994)).

In the two years that passed between Toohey’s original writ petition and the decision on regular appeal, CAAF’s view regarding the role of prejudice with respect to a post-trial due process violation had evolved, and similarly, so did their deference to the service courts’ “unique powers.” During its review, the Navy-Marine Court found that Toohey had not been prejudiced by the excessive delay in the processing of his appeal so that there was no legal error and that there were not sufficiently extraordinary circumstances to warrant finding his sentence to be inappropriate.<sup>186</sup> As it turns out, however, CAAF no longer viewed either of these points to be an obstacle.

Three months after its decision in *Moreno*, CAAF issued its decision in *United States v. Toohey*—a decision which seemed to affirm the old adage that “bad facts make bad law.”<sup>187</sup> The facts regarding the delay in Toohey’s case were certainly egregious. Although it was a contested trial, the transcription and authentication of the record took a relatively long 379 days.<sup>188</sup> It was another 265 days before the convening authority took action, and inexplicably, yet another 161 days from action until the record was delivered to the Navy-Marine Corps Court of Criminal Appeals.<sup>189</sup> Processing of the case while it was docketed at the Navy-Marine Court was no model of efficiency either:

The Navy-Marine Corps Court of Criminal Appeals granted eleven motions for enlargement of time to Toohey’s appellate defense attorney before the defense brief was filed on March 28, 2002 (1,323 days after trial and 518 days after docketing). The Government filed an answer brief on December 6, 2002 (1,576 days after trial and 253 days from submission of Toohey’s brief).

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<sup>186</sup> *United States v. Toohey*, 60 M.J. 703 (N-M. Ct. Crim. App. 2004).

<sup>187</sup> See *United States v. Toohey (Toohey II)*, 63 M.J. 353 (2006).

<sup>188</sup> *Id.* at 357.

<sup>189</sup> *Id.*



Toohey filed a reply brief on February 6, 2003 (1,638 days after trial). The Court of Criminal Appeals issued a published opinion on September 30, 2004 (601 days after the completion of briefing). Six years, one month and seventeen days (2,240 days) elapsed between the completion of trial and the completion of Toohey's appeal of right under Article 66, UCMJ, 10 U.S.C. § 866 (2000).<sup>190</sup>

On remand following Toohey's petition for an extraordinary writ, the Navy-Marine Court had concluded that, while the delay was excessive, there was no violation of due process because Toohey had not demonstrated any prejudice from the delay and that an adjustment of the sentence using the Court's sentence-appropriateness authority under Article 66(c) was not warranted because there were not "extraordinary circumstances" present.<sup>191</sup>

During its review under Article 67, however, CAAF took a different view. The Court analyzed the case using the modified Barker test set forth in *Toohey I* and *Moreno*. Given the unusual and excessive nature of the delay, it is no surprise that the Court found that the delay was excessive under the first Barker factor and that there was not sufficient justification for the delay under the second Barker factor.<sup>192</sup> Regarding the third factor (i.e., assertion of the right to a timely review and appeal), the Court found that Toohey had repeatedly complained about the delay, to include writing to The Judge Advocate General of the Navy, requesting additional appellate defense counsel, and asserting the issue before both the Navy-Marine Corps Court of Criminal Appeals and through his earlier petition to CAAF.<sup>193</sup>

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<sup>190</sup> *Id.*

<sup>191</sup> *Toohey*, 60 M.J. at 709-10.

<sup>192</sup> *Toohey II*, 63 M.J. at 359-60.

<sup>193</sup> *Id.* at 360.



Rather than attempt to resort to mental gymnastics, CAAF forthrightly acknowledged that Toohey had not shown any prejudice from the delay under the final Barker factor. Unlike Moreno, Toohey did not prevail on a claim of other substantive legal error, so he was not able to show that his ability to defend himself upon a rehearing was prejudiced because, quite simply, there was no rehearing at which he could be prejudiced.<sup>194</sup> Similarly, the Court did not find that Toohey experienced any “particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.”<sup>195</sup> Upon balancing the sub-factors, the Court concluded that “[t]his prejudice factor therefore weighs against Toohey.”<sup>196</sup> Normally, a finding of no prejudice would have been fatal to an assertion of legal error during CAAF’s Article 67 review of the case due to the limitation of Article 59(a). In this case, however, CAAF turned back to the precedent it established in *Moreno*, and observed that “no single factor [is] required to find that post-trial delay constitutes a due-process violation.”<sup>197</sup> The Court found that the first three Barker factors weighed in Toohey’s favor and that “[t]he weight of these factors leads to the conclusion that the delay in Toohey’s case is egregious. Balancing these three factors against the absence of prejudice, we hold that Toohey was denied his due process right to speedy review and appeal.”<sup>198</sup>

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<sup>194</sup> *Id.* at 361.

<sup>195</sup> *Id.* (quoting *Moreno*, 63 M.J. at 140).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (quoting *Moreno*, 63 M.J. at 136).

<sup>198</sup> *Id.* at 362.

Before addressing whether Toohey was entitled to relief for this legal error, the Court turned to the issue of whether the Navy-Marine Court had abused its discretion by not granting relief under Article 66(c). CAAF took exception with the position of the Navy-Marine Court that it should only grant Article 66(c) sentence relief under “the most extraordinary of circumstances.”<sup>199</sup> Finding there to be no such constraint upon the ability of a service court to adjust a sentence, CAAF held that the Navy-Marine Court applied an erroneous standard of review and, thus, abused its discretion.<sup>200</sup> Moreover, CAAF found that the service court erred by conducting its sentence appropriateness review with the view that no due process violation had occurred. CAAF also chastised the lower court for including a cite to Article 59(a), UCMJ, in its discussion when to exercise its sentence appropriateness authority, because “[a]s we made clear in *Tardiff*, the Court of Criminal Appeals’ responsibility to affirm only so much of the sentence as should be approved ‘do[es] not implicate Article 59(a).’”<sup>201</sup> In all fairness to the Navy-Marine Corps Court of Criminal Appeals, however, that court had specifically acknowledged that *Tardiff* had given authority to grant sentence relief under Article 66(c) in the absence of actual prejudice.<sup>202</sup> The reference to Article 59(a) in that context was likely a reflection of the Navy-Marine Court’s view that granting sentence relief for nonprejudicial legal error should not be a common occurrence—if granting such relief is even legal in the first place. Regardless, CAAF wasted no time in issuing a firm reminder that Article 59(a) was to play no part in the decision of whether to grant relief for unreasonable post-trial delay.

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<sup>199</sup> *Id.* (quoting Navy-Marine Court in *Toohey*, 60 M.J. at 710).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 363 (quoting *Tardiff*, 57 M.J. at 224).

<sup>202</sup> *Toohey*, 60 M.J. at 710.

Having earlier found that there was a constitutional due process violation, CAAF turned back to the question of whether any constitutional error was harmless beyond a reasonable doubt. The Court found that the egregious delay in the case, with “the adverse impact such delays have upon the public perception of fairness in the military justice system,” combined with the fact that the Navy-Marine Court’s opportunity to grant meaningful relief may be impacted by the fact that Toohey had already completed his sentence to confinement, made it impossible to “be confident beyond a reasonable doubt that this delay has been harmless.”<sup>203</sup> Accordingly, the Court ordered that the case be remanded back to the Navy-Marine Court to consider meaningful relief for the due process violation and to reassess the appropriateness of the sentence.<sup>204</sup> This is important because CAAF found that sentence relief for the post-trial delay could be remedied either through use of the sentence appropriateness authority of Article 66(c), as established in *Tardiff*, or by remedying the due process violation directly. What CAAF did not explain is how directly remedying a legal error which the Court itself expressly found to be nonprejudicial does not violate Article 59(a). Effectively, this opinion took the final step in removing Article 59(a) as an impediment to granting relief for post-trial processing delay and informed the service courts that CAAF would not defer to the service courts’ unique equitable authority under Article 66 if the courts did not remedy egregious, albeit nonprejudicial, error. Whether CAAF, a court of law, even has jurisdiction to tell a service court how to exercise equitable relief is another matter.

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<sup>203</sup> *Toohey II*, 63 M.J. at 363.

<sup>204</sup> *Id.*

As it currently stands, CAAF is the only federal court with criminal jurisdiction that believes that it can remedy excessive post-trial delay when the appellant has not been prejudiced thereby. To practitioners familiar with the differences between the civilian and military justice systems, this fact will likely be seen as highly ironic. First of all, unlike the civilian federal courts, CAAF does not have a blanket supervisory authority under the All Writs Act, 28 U.S.C. § 1651(a). As the Supreme Court of the United States made clear in *Clinton v. Goldsmith*, CAAF's jurisdiction, unlike that of the Article III courts, is strictly limited by its jurisdictional grant from Congress.<sup>205</sup> Moreover, unlike federal civilian courts, the military courts are expressly forbidden by Congress to grant relief for legal errors when there has not been material prejudice to a substantial right by virtue of Article 59(a), UCMJ. Accordingly, the fact that the military courts, which are the only federal courts whose jurisdiction explicitly excludes the ability to grant relief absent prejudice, are the only federal courts which are, in fact, remedying excessive post-trial delay without a showing of prejudice is ironic, indeed.

Almost as disturbing as the result in these cases is the fact that CAAF either relied on extremely incomplete legal research or was being deliberately deceptive in making the argument for why prejudice was no longer an absolute requirement to granting relief. As discussed before, the attempt by the majority in *Moreno* and the *Toohey* cases to portray a “split” between the civilian federal courts regarding the requirement for prejudice was

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<sup>205</sup> See *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999).

disingenuous at best.<sup>206</sup> Even the Sixth Circuit Court of Appeals, whom CAAF cited as supporting the use of a *Doggett* presumption of prejudice, observed a truth which CAAF was conveniently trying to deny: “Although the Supreme Court held in *Barker* that no single factor of the four could be deemed ‘either a necessary or sufficient condition,’ none of the decisions of this or any other circuit applying *Barker* to the appellate context has granted a due process speedy trial motion absent a significant showing of prejudice.”<sup>207</sup> Similarly, the use of quotes from *Dunlap* as precedent for the establishment of the post-trial processing standards in *Moreno* overlooked the obvious fact that, not only was the legal reasoning in *Dunlap* heavily criticized throughout the military legal community, the questionable authority created in *Dunlap* was limited to activities occurring before the convening authority’s action.<sup>208</sup>

CAAF’s treatment of the Barker factors in order to make it easier for an appellant to prevail upon a due process claim was also suspect. Holding the government accountable for defense-requested delays during the appellate process is truly novel. There is little doubt that the staffing of the defense appellate divisions is controlled by the government and that severely understaffing the divisions could create unfair delays, but as the Court indicated in *Diaz v. The Judge Advocate of the Navy*, appellants already had the ability to challenge poor staffing of their case through filing an extraordinary writ petition and the service courts had

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<sup>206</sup> See *supra* pp. 49-50, discussing *United States v. Smith*, 94 F.3d 204 (6th Cir. 1996) and *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994).

<sup>207</sup> *United States v. Gray*, 52 Fed. Appx. 650, 654 (6th Cir. 2002)(unpub.)(quoting *Barker v. Wingo*, 407 U.S. 514, 533 (1973)). In all fairness to the judges on CAAF and their respective legal clerks, this was an unpublished decision, but one that should have been found merely by shepardizing *Smith*.

<sup>208</sup> See *Moreno*, 63 M.J. at 141 (quoting *Dunlap v. Convening Authority*, 48 C.M.R. 751, 754 (C.M.A. 1974)).



the authority to order more expeditious briefing or else, remedy any failures at that point.<sup>209</sup>

To create a *de facto* rule, however, that the government is responsible for all delays by appellate defense counsel only serves to create a paradox whereby appellate defense counsel are actually encouraged to delay briefing a case because any delay has the potential to result in sentence relief for their client. The service courts are then put in a position of having to guess whether defense-requested delays are due to a genuine need for more time by appellate defense counsel or whether the defense is merely trying to create a due process issue.

Similarly, CAAF's attempt to allow a finding of prejudice under a Barker analysis with a showing of an actual adverse impact on an appellant's appeal or on any retrial or rehearing is based on shaky precedent. As the Court itself acknowledged in *Moreno*, an appellant cannot prove prejudice under two of the three grounds for prejudice under the Barker analysis unless he has prevailed on another substantive legal issue requiring relief or has been impaired in his ability to litigate his appeal or any retrial or rehearing.<sup>210</sup> Such grounds would obviously constitute material prejudice to a substantial right and, if present, would easily satisfy the limitation of Article 59(a). The last of the Barker grounds (i.e., minimizing anxiety and concern) is somewhat more subjective, however. While CAAF did not directly hold that an egregious delay in itself could be deemed to have caused the "particularized anxiety or concern" necessary to constitute prejudice, it did try to imply that there was another "split" in the federal circuits regarding this point by stating that "[t]he Second Circuit has affirmed district court decisions which found anxiety-based prejudice that

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<sup>209</sup> See *Diaz v. The Judge Advocate of the Navy*, 59 M.J. 34 (2003).

<sup>210</sup> See *Moreno*, 63 M.J. at 139-41.

arose solely from the length of the delay.”<sup>211</sup> This statement, however, was something of a red herring.

The *Yourdon* and *Snyder* cases cited by CAAF were both state criminal cases in which the petitioners were seeking a federal writ of habeas corpus due to excessively long post-trial processing. While both of the district court opinions (issued on the same day and virtually identical in their holdings) did, in fact, indicate that the Court felt that the anxiety created by an extensive delay could constitute legal prejudice, the Court held that it could not grant relief unless the petitioners’ appeals had actually been tainted by the delay.<sup>212</sup> The Court denied both petitioners’ requests for writs of habeas corpus and instead, suggested that a civil suit for damages under 42 U.S.C. § 1983, would be the more appropriate avenue for relief. The table decisions of the Second Circuit Court of Appeals cited by the *Moreno* court merely affirmed the dismissals of the petitions by the district court and contained no discussion themselves. While CAAF slipped in a footnote stating that “[t]hose district courts and the Second Circuit have found that the more appropriate remedy for anxiety-based prejudice arising from excessive delay is an action for damages under 42 U.S.C. § 1983 ...,” this statement, too, is misleading because it implies that the courts believed that they could have granted relief if they had found it more appropriate.<sup>213</sup> The Second Circuit, in *Cody v. Henderson*, made it clear, however, that the federal courts could not grant the requested relief

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<sup>211</sup> *Id.* at 139 (citing *Yourdon v. Kelly*, 969 F.2d 1042 (2d Cir. 1992)(table decision), aff’g 769 F. Supp. 112, 115 (W.D.N.Y. 1991); *Snyder v. Kelly*, 972 F.2d 1328 (2d Cir. 1992)(table decision), aff’g 769 F. Supp. 108, 111 (W.D.N.Y. 1991)).

<sup>212</sup> *Yourdon*, 769 F. Supp. at 115; *Snyder*, 769 F. Supp. at 111.

<sup>213</sup> *Moreno*, 63 M.J. at 139 n.16 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 2000)).

(i.e., a writ of habeas corpus) unless the appeal “has been tainted” by the delay.<sup>214</sup> While not dispositive to the *Moreno* case, CAAF’s use of misleading citations to get a foot in the door with respect to further lowering the bar for the prejudice requirement is troubling.

The unfortunate bottom line is that CAAF used whatever means was necessary to achieve the end of remedying post-trial delay, even in the absence of prejudice. It couched the service courts’ authority in sentence appropriateness terms even though the post-*Tardiff* cases remedying post-trial delay never seem to actually go through the traditional analysis of whether the sentence is fair given all of the facts of the case. Indeed, even when finding that the Navy-Marine Court abused its discretion by not granting relief in *Toohey*, CAAF never discussed the circumstances of Toohey’s offenses and whether his overall sentence was relatively harsh or light.<sup>215</sup> If granting sentence relief for unusual post-trial delay were truly part of the service court’s determination of an appropriate sentence rather than merely remedying a legal error, one would expect to see at least some discussion of whether the sentence was actually fair and “should be approved.”<sup>216</sup> As it is, this supposed ground for granting relief appears to be merely pretext and semantics. As for its own authority to grant relief under Article 67, CAAF’s refusal to acknowledge that no other federal court had ever granted relief for appellate delay in the absence of actual prejudice and its failure to explain how it could order relief in *Toohey II* despite specifically finding there to be no prejudice to

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<sup>214</sup> *Henderson*, 936 F.2d at 720. It is of note that the *Henderson* court did approve of the use of a conditional writ directing completion of a pending appeal that was taking too long similar to that issued by CAAF in *Diaz*.

<sup>215</sup> *Toohey II*, 63 M.J. at 353.

<sup>216</sup> See MacDonnell, *supra* note 107, for an excellent discussion of post-*Collazo* cases purporting to rely upon Article 66(c) to grant relief for post-trial delay.

the appellant just demonstrates that it no longer views the Article 59(a) requirement for prejudice to be a significant obstacle.

## V. Proposed Changes.

There is no doubt that the problem of excessive post-trial delay is a difficult one which needs to be fixed. There should also be little doubt that the military courts lack the jurisdiction to fix post-trial delay that does not cause actual prejudice to an appellant. This does not mean, however, that the problem can not be alleviated to some degree. An obvious solution would be to increase staffing of personnel responsible for the post-trial process, from court-reporters to appellate counsel, but given limited resources and the primary mission of the U.S. military to fight wars around the world, such increases may not be entirely feasible. There are easier administrative changes that would help reduce some obvious causes of post-trial delay and ameliorate some of the difficulties faced by servicemembers awaiting appeal.

### A. Amendments to the Rules for Courts-Martial.

As Judge Crawford noted in her dissent to *Moreno*, the President is the appropriate authority to promulgate rules for processing courts-martial by virtue of Article 36, UCMJ.<sup>217</sup>

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<sup>217</sup> *Moreno*, 63 M.J. at 144 (Crawford, J. dissenting)(citing UCMJ art 36, 10 U.S.C. § 836 (2005)). Article 36, UCMJ, provides:

Pre-trial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Unlike the military courts, which do not have a general supervisory authority, Congress specifically empowered the President, as Commander-in-Chief, with the authority to administer the military justice system. The Rules for Courts-Martial are the result of that grant of authority. The President could, if he so desired, mandate certain processing deadlines and provide for specific penalties in case the deadlines were not met. Once again, however, the establishment of rigid rules for a military justice system which must operate in very fluid and difficult environments may not be the wisest course of action. The ultimate goal should be rules which expedite post-trial processing, prevent cases from getting lost in a proverbial post-trial limbo, and which reduce potential harm to appellants caused by delays but which still allow for the flexibility required by the military.

One of the most common sources for post-trial delay is in the transcription and authentication of the record of trial. Obviously, the services should explore the use of new technologies, such as voice recognition software, to speed the transcription of records, but at the end of the day, there is currently no effective way for a convicted servicemember to complain about excessively slow transcription and authentication or to ascertain whether there are legitimate reasons behind any delay. Neither the convening authority nor the servicing office of the staff judge advocate is required to give an explanation as to why a record of trial has not been completed.

Rule for Courts-Martial (R.C.M.) 1104 covers the preparation and authentication of the record of trial.<sup>218</sup> Subsection (e) of the rule currently provides:

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<sup>218</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1104 (2005)[hereinafter MCM].



*Forwarding.* After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in the case of a special court-martial in which a bad-conduct discharge or confinement for one year was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for recommendation under R.C.M. 1106 before the convening authority takes action.<sup>219</sup>

Given the recurring problems at this stage of post-trial processing, the following language should be added to subsection (e):

The accused shall be provided with written notice when the authenticated record is forwarded to the convening authority, staff judge advocate, or legal officer for review under this section. If the accused has not received notice by 120 days from the date the sentence was adjudged at court-martial, the accused may, at any time thereafter, request that the convening authority explain the reasons behind the delay. Within ten days of service of this request, the convening authority shall respond in writing and specifically indicate why the record of trial had not been authenticated and when it is expected that the record will be authenticated.

While not a dramatic addition, this change would accomplish two goals. First, the convening authority will be reminded that the processing of the court-martial record has passed a certain milestone and will be forced to address the fact that authenticating the record is taking a significant amount of time. If the reason for the delay is justified, the convening authority can so indicate and nothing else needs to be done. If there is no good reason for the delay, then the convening authority can direct the staff judge advocate or legal officer to expedite the processing. Secondly, the written response creates a contemporaneous record documenting the reasons behind the delay which will aid an appellate court in determining whether any delay at that stage of the processing is unreasonable.

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<sup>219</sup> MCM, *supra* note 218, R.C.M. 1104(e).

The cost of this provision would be relatively small. The servicing office of the staff judge advocate or legal officer responsible for preparing the record would merely have to prepare a short memorandum explaining the cause of any delay, which the convening authority would endorse if satisfied with the reasons. While not an onerous requirement, the simple fact that the staff judge advocate or legal officer will be required to inform the convening authority about the status of the processing will help deter cases from just sitting unattended. In extreme cases of delay, the convening authority's response could be used as evidence in a petition for extraordinary relief before a service court of criminal appeals.

Another provision should be added to the Rules for Courts-Martial regarding transmittal of the record to the service court of criminal appeals following action. In theory, the process should be fairly simple. Following action by the convening authority, the promulgating order is prepared, copies are made of the record of trial and, when there is a right to appeal, the documents are mailed to the service court of criminal appeals.<sup>220</sup> Despite the routine administrative nature of this procedure, inexplicable delays often occur. For example, in *Toohey*, it took 146 days from the convening authority's action for the case to be docketed at the Navy-Marine Corps Court of Criminal Appeals and in *Moreno*, it took 76 days.<sup>221</sup> As the Court aptly noted, "[d]elays involving this essentially clerical task have been categorized as 'the least defensible of all' post-trial delays."<sup>222</sup>

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<sup>220</sup> MCM, *supra* note 18, R.C.M. 1111(a)(1), 1114, and 1201(a).

<sup>221</sup> *Toohey II*, 63 M.J. at 360; *Moreno*, 63 M.J. at 136-37.

<sup>222</sup> *Moreno*, 63 M.J. at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)); *Toohey II*, 63 M.J. at 360.

The military justice system seeks to balance the needs of a dynamic military with the rights of a criminal accused, but in some cases, there is relatively little military necessity to justify reducing due process rights. Absent unusual circumstances, given today's modern technology and transportation, there is no reason why copies cannot be made of a record of trial and the record mailed from anywhere in the world to arrive at the service court in a reasonably short period of time. Accordingly, the following subsection should be added to Rule for Courts-Martial 1201(a):

(3) Absent military exigency or extraordinary circumstances beyond the control of the government, if the record of the court-martial is not received by the Court of Criminal Appeals twenty calendar days from the date the convening authority takes action in the case, the Court of Criminal Appeals shall grant one day of sentence credit, or the equivalent, for each day past twenty days until the record is received. The Court of Criminal Appeals shall have the sole discretion to determine whether sufficient military exigency or extraordinary circumstances exist to justify any delay in receipt.<sup>223</sup>

By its terms, this rule would allow late delivery to be excused for reasons of military exigency—e.g., the unit is in the midst of military maneuvers or the command is aboard a vessel at sea. Similarly, unusual circumstances such as natural disasters or civil disturbances could serve as justification for a delay. In such a way, the rule would not be so rigid as to compel a windfall to an appellant just because the unit happened to be engaged in a mission essential to national security, but would otherwise force legal offices to perform the “essentially clerical” task of copying and mailing the record of in an expeditious manner. While CAAF does not have the authority to create a rule with a specific processing deadline,

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<sup>223</sup> See MCM, *supra* note 18, R.C.M. 1201(a). R.C.M. 1201(a) requires The Judge Advocate General to forward cases subject to appellate review to the Court of Criminal Appeals. In reality, cases are generally mailed from the unit directly to the service court. See, e.g., U.S. DEPT. OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 5-46(a)(16 November 2005).

notwithstanding the holding in *Moreno*, there is no doubt that the President does have such authority, and this is one instance where the exercise of that authority would be appropriate.

#### B. Regulatory Changes.

In some cases, post-trial processing will necessarily take a longer period of time due to the length of the record or complex legal issues. There are, however, steps that can be taken to reduce some of the unnecessary burdens placed on servicemembers awaiting appeal that are caused by inflexible bureaucratic provisions. For example, a servicemember who has completed his sentence to confinement before the appellate process has been completed may be precluded from applying for certain jobs because he does not receive a Department of Defense (DD) Form 214, Certificate of Release or Discharge from Active Duty, until his conviction is final. While this may seem to be a tenuous ground for granting relief for a post-trial delay, even before *Moreno* and *Toohey*, the military courts found prejudice for Article 59(a) purposes, in cases where a servicemember could demonstrate that his failure to have a DD-214 hurt his chances of getting civilian employment.

It has never been disputed that, in cases involving unreasonable post-trial delay, an appellant can be granted relief when he demonstrates material prejudice to a substantial right. In *United States v. Bruton* and in *United States v. Sutton*, the then-Court of Military Appeals set aside the findings and sentence and dismissed all charges in both cases due to the appellants' un rebutted assertions that they were prejudiced because they did not have DD-



214s while on appellate leave.<sup>224</sup> More recently, in *United States v. Jones*, CAAF granted relief on the same grounds based upon affidavits from prospective employers who indicated that the appellant was not considered for employment simply because he lacked a DD-214.<sup>225</sup> As the Court observed, “[r]egardless of whether Appellant’s potential employer *should* have required a DD-214 as a condition of employment, it appears that the potential employer *did*. The unreasonable delay in this case prevented Appellant from satisfying that requirement.”<sup>226</sup> Having found that Jones thereby demonstrated prejudice for purposes of Article 59(a), the Court set aside Jones’ bad-conduct discharge.<sup>227</sup>

It is perfectly understandable why the services do not currently give servicemembers who are awaiting appeal a DD-214. The DD-214 is titled “Certificate of Release or Discharge from Active Duty” and a servicemember is not officially discharged until finalization of his appellate process, as per Article 71, UCMJ.<sup>228</sup> While the case is pending appellate review, a soldier is placed in an excess leave status.<sup>229</sup> Department of Defense Instruction (DODI) 1336.1, which sets forth the procedures for preparing the DD-214, indicates that the DD-214 will provide “[t]he Service member with a brief, clear-cut record of the member’s active service with the Armed Forces at the time of transfer, release, or

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<sup>224</sup> *United States v. Bruton*, 18 M.J. 156 (C.M.A. 1984); *United States v. Sutton*, 15 M.J. 235 (C.M.A. 1983).

<sup>225</sup> *United States v. Jones*, 61 M.J. 80, 84 (2005).

<sup>226</sup> *Id.* at 85 (emphasis in original).

<sup>227</sup> *Id.* at 86.

<sup>228</sup> UCMJ art. 71.

<sup>229</sup> UCMJ art. 76a.



discharge, or when the member changes status or component while on active duty.”<sup>230</sup> In addition to servicemembers who are discharged, the form is also issued to servicemembers who transfer components, reservists who complete tours of active duty, and enlisted persons upon reenlistment or promotion to a warrant or commissioned officer.<sup>231</sup> The form lists not only the discharge date and type, but also the length of active duty service and any awards and special training the servicemember may have received.<sup>232</sup> Given that the form concisely and officially summarizes a servicemember’s time in service, it is no surprise that some employers may require a DD-214 from applicants they know to have military service.

The solution to this problem could be remarkably simple—give interim DD-214s to convicted servicemembers who have completed their sentence to confinement and are being put on excess leave. If soldiers who are reenlisting are issued DD-214s, then why not allow the same for a convicted servicemember awaiting appeal? Of course, the DD-214 would have to indicate that the punitive discharge has not actually been executed, but that would be a relatively simple matter. In the remarks section of the form, one could add the following caveat:

Member was adjudged a [bad conduct][dishonorable] discharge by a [special][general] court-martial on [date]. Member is on excess leave status pending the completion of appellate review under the UCMJ. Adjustments to length of service and any changes in the nature of the discharge will be made by DD-215 upon execution of the discharge.

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<sup>230</sup> U.S. DEP’T OF DEFENSE, INSTR. 1336.1, CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (DD FORM 214/5 SERIES) para. 2.2.2. (6 Jan. 1989)[hereinafter DOD INSTR. 1336.1].

<sup>231</sup> DOD INSTR. 1336.1, paras. 3.2.2. and 3.2.3.

<sup>232</sup> *Id.* at para. 3.4.

Once the sentence is executed, the DD-214 would then be amended by the issuance of a DD Form 215, Correction to DD Form 214, which is routinely used to reflect changes to a previously issued DD-214.<sup>233</sup>

Changing DODI 1336.1 to allow for this process could be done through a directive from the President or simply upon the order of the Secretary of Defense. This minor regulatory change would only require military personnel offices to issue DD-214s earlier than they otherwise would and to issue a short, one-page DD-215 upon execution of the sentence. The DD-214 itself would not purport to reflect an executed discharge, but could be used by a servicemember to provide a prospective employer with official confirmation of the servicemember's status, length of service, awards, and training and would effectively remove the prejudice cited by *Jones*, *Bruton*, and *Sutton* as the basis of setting aside otherwise proper sentences.

Another source of potential prejudice argued by appellants is the fact that servicemembers are not eligible to be considered for clemency or parole by the services' review boards until the convening authority has taken action on the case. Congress has authorized the Secretary of Defense, through Title 10, United States Code, Chapter 48, to establish a system for granting clemency and parole.<sup>234</sup> This authority is exercised through

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<sup>233</sup> *Id.* at para. 3.5.3.

<sup>234</sup> 10 U.S.C. §§ 953-954 (2005); *see also* UCMJ art. 74.

Department of Defense Directive (DOD Dir.) 1325.4 and DODI 1325.7.<sup>235</sup> Paragraph 6.16.6

of DODI 1325.7 provides:

Clemency and Parole Boards shall normally consider an individual for clemency, restoration to duty or reenlistment when the court-martial convening authority has taken action on the sentence; the individual's case has been reviewed by a confinement facility disposition board or by an appropriate Federal correctional or probation official; and the individual meets the eligibility criteria.<sup>236</sup>

With respect to parole, the instruction provides that one of the grounds for eligibility is that “[t]he prisoner has an *approved* unsuspended punitive discharge or dismissal or an approved administrative discharge or retirement.”<sup>237</sup> The instruction, however, does state that, “[w]hen exceptional circumstances exist or for other good cause, a Clemency and Parole Board may waive any prisoner’s parole eligibility requirement with the exception of [death sentences].”<sup>238</sup>

Over the years, many appellants have raised the fact that they were precluded from clemency and parole consideration by delays in the convening authority taking action in their cases. In *United States v. Hawkins*, the then-Army Court of Military Review set aside the findings and sentence and dismissed all charges upon finding that the delay in action and transmittal of the record to the confinement facility prejudiced Hawkins by delaying his

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<sup>235</sup> U.S. DEP’T OF DEFENSE, DIR 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001)[hereinafter DOD DIR. 1325.4]. U.S. DEP’T OF DEFENSE, INSTR 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 Jul. 2001)[hereinafter DOD INSTR. 1325.7].

<sup>236</sup> DOD INSTR. 1325.7, para. 6.16.6.

<sup>237</sup> *Id.* at para. 6.17.1.1. (emphasis added).

<sup>238</sup> *Id.* at para. 6.17.7.

consideration for clemency—which he was ultimately granted.<sup>239</sup> Many other cases have addressed similar claims, but in most cases, the courts conclude that the claims of prejudice regarding the denial of the opportunity for clemency or parole are too speculative given that the appellant cannot usually prove that he would have been granted relief by the review board.<sup>240</sup>

Regardless of whether an appellant can show that he likely would have been granted clemency or parole, the current regulations clearly deprive some servicemembers of the opportunity to even be considered.<sup>241</sup> This results in an incongruous situation where, in the case of two prisoners convicted of similar offenses with similar sentences, one will be considered for clemency and parole and the other will not, simply because the convening authority has taken longer in approving the latter’s court-martial findings and sentence. There is no legal reason why a servicemember cannot be considered for clemency and parole before action. While there may be some reluctance to step on the toes of a convening authority who still maintains jurisdiction over a case, the Secretary of Defense’s grant of authority under sections 952 and 953 of Title 10 is not predicated on there being an approved sentence. Indeed, in *United States v. Bigelow*, the government argued, and CAAF agreed, that the appellant was not legally precluded from applying for parole in that case even

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<sup>239</sup> *United States v. Hawkins*, 49 C.M.R. 57 (A.C.M.R. 1974).

<sup>240</sup> See, e.g., *United States v. Hudson*, 46 M.J. 226, 227 (1997); *United States v. Agosto*, 43 M.J. 853 (N-M. Ct. Crim. App. 1996); *United States v. Due*, 2007 CCA LEXIS 207 (A.F. Ct. Crim. App. May 30, 2007)(unpub.).

<sup>241</sup> While DODI 1325.7 does provide for a possible waiver for “exceptional circumstances or other good cause,” it is not clear how difficult those standards are to meet.

without an approved sentence—presumably relying on the possibility of receiving a waiver under DODI 1325.7.<sup>242</sup>

Similarly, there may be some reluctance to consider a servicemember for clemency or parole because the convening authority could eventually approve a sentence different from the one adjudged or could even disapprove the entire sentence. The problem there is that, under Article 60, UCMJ, the convening authority cannot approve a sentence that is greater than that adjudged.<sup>243</sup> The fact that a servicemember's sentence may yet be reduced by the convening authority should have no logical bearing on whether clemency and parole can be considered and, if anything, should actually encourage early consideration of cases whose adjudged sentences may be unduly harsh. The military justice system is designed to promote clemency and fairness with there being many opportunities for a sentence to be reduced that do not exist in the civilian justice system. Removing one of these opportunities because a servicemember's case is being processed slowly only exacerbates the already considerable problems caused by dilatory post-trial processing practices and adds a potential for prejudice where one need not exist. There is no logical reason why prisoners should be treated differently based upon the status of their post-trial processing. Consequently, DODI 1325.7 should be amended to remove the prohibitions on servicemembers being considered for clemency or parole simply because their sentences have not been approved by the convening authority.

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<sup>242</sup> *United States v. Bigelow*, 57 M.J. 64, 69 (2002).

<sup>243</sup> UCMJ art. 60(c)(2).



## VI. Conclusion.

The problem with unexplained and unreasonable post-trial delay has plagued the military justice system since the inception of the Uniform Code of Military Justice. Despite repeated warnings from the military courts, the problem only seems to have gotten worse. It is, therefore, understandable that CAAF would become increasingly frustrated and seek to find ways to remedy this problem itself. Unfortunately, Congress explicitly limited the jurisdiction of the military courts to preclude them from remedying legal errors which do not result in material prejudice to a substantial right. Accordingly, CAAF's attempts to find a way around the limitation of Article 59(a), quite simply, are unlawful. Whether relying on semantics to give the service courts apparent authority to grant relief under Article 66(c), or simply ignoring Article 59(a) altogether, as in *Toohey*, it does not change the fact that the military courts are now reducing sentences on the ground of an error of law without the required showing of prejudice.

The President, and to a lesser extent, the Secretary of Defense, do have the authority to improve the current system. Amending the Manual for Courts-Martial as proposed would help to expedite the early stages of post-trial processing, which are the sources of most unexplained delay. Changing Department of Defense regulations regarding clemency, parole, and the preparation of DD-214s would also help to reduce common sources of prejudice caused to servicemembers awaiting appeal of their cases. Combined with other steps, such as increasing personnel in the appellate divisions and using more efficient

techniques of transcription, the problem of dilatory post-trial processing can be quickly and lawfully ameliorated without having to resort to questionable legal holdings.